Supreme Court, U.S.
FILED

No. 95-11 21 NOV 16 1995

OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1995

William A. Calvo, III,

Petitioner

- against -

United States Court of Appeals for the Eleventh Circuit

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William A. Calvo, III, *Pro Se*
11355 Southeast 54th Avenue
Belleview, Florida 34420
(904) 245-4126
Petitioner

Dated: November 15, 1995
Refiled in Revised Printing Format January 12, 1996

9 pp

QUESTIONS PRESENTED

1. Did the Petitioner establish a prima facie case before the Respondent in response to the order to show cause why he should not be disbarred based on the decision of the Florida Supreme Court?

2. Did the disbarrment of the Petitioner after he had presented an uncontested prima facie case challenging the constitutional validity and propriety of his disbarrment in Florida, without a hearing or introduction of evidence contradicting that presented by the Petitioner violate the Petitioner's[1] rights to due process under the 5th Amendment to the United States Constitution

3. Did the vacater of the decision underlying the Petitioner's disbarrment in Florida constitute grounds requiring the Respondent to independently determine the Petitioner's continued fitness to practice law before it?

4. Did this Court's interpretation of Section 10(b) of the Securities Exchange Act of 1934, as amended, in Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1995), 114 S.Ct. 1439; 61 U.S.L.W. 1813 (1994),[2] in light of the Florida Supreme Court's reliance on legal decisions at odds with the Central Bank Case, require the Respondent to independently determine the Petitioner's continued fitness to practice law before it?

5. Are the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution inapplicable, in whole or in part, to governmental actions not designated as involving "criminal" matters?

6. Was there a constitutionally cognizable right to counsel in the proceedings before the Florida Supreme Court?

7. Did the action of the Respondent constitute prohibited "automatic" disbarrment of the Petitioner based on the decision of the Florida Supreme Court action.

---

1. Hereafter referred to as "Mr. Calvo."

2. Hereinafter referred to as the "Central Bank Case."

LIST OF PARTIES

The Parties to the proceeding below are:

William A. Calvo, III
Petitioner
11355 Southeast 54the Court; Belleview, Florida 34420

The U.S. Court of Appeals for the Eleventh Circuit
The Honorable Miguel J. Cortez, *Clerk*
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.; Atlanta, Georgia 30303

In addition, since this action involves an agency or officer of the United States, the Solicitor General of the United States is an interested party;

The Honorable Drew S. Days, III
Solicitor General, United States Department of Justice
Washington, D.C. 20530

TABLE OF CONTENTS

Item	Pages
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
I Opinion Below	1
II Jurisdiction	1
III Constitutional, Statutory & Regulatory Provisions Involved	1
IV Statement of the Case	3
V Reasons for Granting the Writ	14
VI Argument	15
VII Conclusion	30
Signature	30
Appendix	31[3]
Order to Show Cause	31
Order of Disbarment	31
Petitioner's Initial Response to Order to Show Cause	32
Supplements to Initial Response to Order to Show Cause	72
Vacater Decision	75
Constitutional, Statutory and Regulatory Provisions Involved:	77
United States Constitution:	
Article One, Section 9[3]	77
5th Amendment	77
6th Amendment	77
8th Amendment	77
14th Amendment	77
Florida Constitution	
Article One:	
Section Two	78
Section Nine	78
Section Sixteen	78
Section Seventeen	79
Rule 46(b) of the Federal Rules of Appellate Procedure	79

---

3. Footnotes to the cases contained in the Appendix are numbered sequentially throughout the Appendix, rather than as numbered in the decisions, due to the requirements of the word-processing program utilized to prepare them.

Rule 5 of the Rules Governing Attorney Discipline
in the U.S. Court of Appeals
for the Eleventh Circuit 79
Securities and Exchange Commission Rules:
Rule 436 81
Rules Regulating the Florida Bar
Former Rule 1-102(A) 83
Rule 3-7.4(k) 83
Rule 4-1.2 84
Rule 4-3.7 85
Florida Evidence Code
Section 90.203 85
Section 90.616 86

TABLE OF AUTHORITIES

Constitutional Provisions

United States Constitution, Fifth Amendment, pages 2, 14, 25 and 28.

United States Constitution, Fourteenth Amendment, pages 2, 16, 21, 22, 25 and 28.

Florida Constitution, Article One, Section One, page 2 and 22.

Florida Constitution, Article One, Section Two, page 2 and 22.

Florida Constitution, Article One, Section Sixteen, page 2 and 22.

Florida Constitution, Article Ten, Section 9, page 21.

Cases

Austin v Bradley, Barry & Tarlow, CCH F.Sec.L.R., Paragraph 98,219 (current developments, summary in CCH F.Sec.L.R., Update Pamphlet Number 1611, June 1, 1994, at page 4.

Baggett v Bullitt, 377 U.S. 360 (1964), page 16.

Bonner v City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), page 15.

Bouie v City of Columbia, 378 U.S. 347, 354; 87 S.Ct. 1697, 1703 (1964), page 23.

Brown v Louisiana, 383 U.S. 131 (1966), page 16.

Camp v Dema, et. al., (8th Cir. 1991), reported at 91 CCH F.Sec.L.R. - Decisions - Paragraph 96,291, page 29.

William A. Calvo, III, Case Number 94-1001; ___ F.2d ___ (11th Cir., August 21, 1995), page 1. pages 1, 4, 5, 6, 8, 10, 14 and 15.

William A. Calvo, III v United States District Court for the Southern District of Florida, (11th Cir., Appeal Number 95-

4230), pages 4, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 29.

Cash v Culver, 120 So.2d 590 (Fla. 1960), page 22.

Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), 114 S.Ct. 1439; 61 U.S.L.W. 1813 (1994), pages 3, 6, 10, 11, 14, 15, 20, 24, 26 and 29.

Collingsworth v Mayo, 173 F.2d 695 (5th Cir. 1949), page 22.

Cox v Louisiana, 379 U.S. 536 (1965), page 16.

Davis v United States, 415 F.Supp 1086 (D. Kan. 1976), pages 15 and 27.

Edwards v South Carolina, 372 U.S. 229 (1963), page 16.

Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978), pages 26 and 27.

Florida Bar v Randolph, 238 So.2d 635 (1970), page 26.

Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), pages 16 and 22.

Gallagher & Co., Russell K. Gallagher and Laura K. Gallagher v Commission, Appeal Number 91-5476 (11th Cir. 1992), *rehearing denied*, pages 6, 8 and 14.

Harrell v Tobriner, 279 F.Supp 22 (D. D.C., 1967), page 15.

Holman v Washington, 364 F.2d 618 (5th Cir. 1967), page 27.

In re Cascade International Securities Litigation.; CCH F.SEC.L.R. Paragraph 98,110, United States District Court, Southern District of Florida, Case No. 91-8652-CIV-NESBITT, December 15, 1993, page 29.

In re Disbarrment of Isserman, 345 U.S. 286, 288, 73 S.Ct. 676 (1953), page 17.

In Re William A. Calvo, III, Florida Bar Case Number 87-21,392(17C), pages 4, 5, 6, 9, 11, 12, 18, 22 and 23.

In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), pages 7, 8, 9 and 14.

In re Wilkes, 494 F.2d 472 (5th Cir. 1974), page 17.

In re Ruffalo, 3901 U.S. 544, 547, 88 S.Ct. 1222, 1224 (1968), page 17.

Keyishian v Board of Regents, 385 U.S. 589 (1967), page 16.

Lovell v City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed.2d 949 (1938), page 16.

Matthews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976), page 16.

NAACP v Button, 371 U.S. 415 (1963), page 16.

Pinter v Dahl, 108 S. Ct. 2063 (1988), page 29.

Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (Fla. 3rd DCA 1984), page 21.

Schatz, et. al. v Rosenberg, et. al., (4th Cir. 1991), reported at 91 CCH F.Sec.L.R. - Decisions - Paragraph 96,222, page 29.

SEC v Electronics Warehouse, Civil Number H-86-282 (PCD), order dated May 31, 1995, pages 1, 4, 14, 15, 24, 25, 26 and 30.

SEC v Electronics Warehouse, 689 F.Supp. 53 (D. Conn., 1988), *aff'd* 891 F.2d 457 (2nd Cir. 1989), *cert. denied*, 496 U.S. 942 (1990), pages 1, 9, 14, 21 and 28.

Selling v Radford, 243 U.S. 46, 37 S.Ct. 377 (1917), pages 17 and 20.

Southeast Aluminum Supply Corp. v Metropolitan Dade County, 533 So.2d 777 (Fla. 3rd DCA 1988), page 16.

Talley v California, 362 U.S. 60 (1960), page 16.

The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, Securities and Exchange Commission Administrative Cases Number 3-6953 and 3-6907, Exchange Act Release Number 29244; reported at 91 CCH Dec., F.Sec.L.R. Paragraph 84,828, pages 6 and 14.

Thread v United States, 354 U.S. 278, 281; 77 S.Ct. 1274, 1276 (1957), page 17.

Thornhill V Alabama, 310 U.S. 88 (1940), page 16.

Tumey v State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), page 28.

Twiss *et. al.* v Kury *et. al.*, Appeal Number 92-2475 (11th Cir., 1994)4, page 29.

Tyler v Vickery, 521 F.2d 1089 (5th Cir. 1975), pages 15, 16 and 21.

United States v Grande 620 F.2d 1026, at 1035 (4th Cir., 1980), page 10.

Watkins v United States, 354 U.S. 178 (1957), page 16.

Weathers v Davis, 196 So. 487 (Fla. 1940), page 22.

Wilkes II, 782 F.2d. 918 (11th Cir. 1986), pages 7, 17 and 23.

Statutes

Final Decisions of Courts of Appeal, 36 Stat. 1157, 28 U.S.C. Section 1254 (June 27, 1988), page 1.

Securities Exchange Act of 1934, as amended, Section 10(b), pages 2, 10, 28 and 29.

The Florida Evidence Code, Florida Rules of Court, West Publishing Company, 372 So.2d 1369 *et. seq.* (1979), as amended:

Section 90.203, pages 2 and 8.

Section 90.616(c), pages 2 and 9.

Federal Rules of Appellate Procedure

Rule 46(b), pages 1 and 2.

Rules Promulgated by the Securities and Exchange Commission

Rule 436 of Securities and Exchange Commission Regulation C, pages 2, 10 and 11.

Rule 2e of the General Rules of the Securities and Exchange Commission, pages 2, 7, 9, 14 and 29.

Item 24 of Exhibit Schedule in Item 601 of Securities and Exchange Commission Regulation S-K, page 10.

Florida Bar Rules

Rules Governing the Florida Bar ("R.Reg.F.B."), Florida Rules of Court, West Publishing Company, 494 So.2d 977 *et. seq.* (1987), as amended:

Rule 3-7.4(k), pages 2 and 7.

Rule 4-3.7, subsections (1), (2) and (3), pages 2 and 8.

Former Florida Bar Code of Professional Responsibility:

DR 1-102(A), pages 2, 7, 12, 23 and 24.

Other Sources

American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980); page 12.

Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977); page 12.

Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37* The Business Lawyer 915 (1982); page 12.

Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), 35 The Business Lawyer 605 (1980), page 12.

Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46; page 11.

PETITIONER, William A. Calvo, III. respectfully prays that a writ of certiorari issue to review the final order of the Respondent in the matter of William A. Calvo, III, Case Number 94-1001; ___ F.2d ___ (11th Cir., August 21, 1995), disbarring the Petitioner from practice before the Respondent, based on his disbarrment by the Florida Supreme Court on December 16, 1993.

I. OPINION BELOW

The order of the Respondent in this matter is included in the Appendix included herewith. The order to show cause which initiated the subject proceeding, together with the Petitioner's response thereto are also included in the Appendix.[4]

II. JURISDICTION

The opinion of the Respondent was filed on August 21, 1995. The jurisdiction of this Court is invoked pursuant to 36 Stat. 1157, 28 U.S.C. Section 1254 (June 27, 1988). Jurisdiction in the Respondent is believed to have been predicated on Rule 46(b) of the Federal Rules of Appellate Procedure.

III. CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS

Constitutional Provisions

United States Constitution, Article One, Section Nine [3];

---

4. The facts underlying the decision in the case below were based on the decision in the case of Commission v Electronics Warehouse, *et. al.*, 689 F. Supp. 53 (D. Conn. 1988), *affirmed* 891 F.2d 457 (2nd Cir. 1989), *cert. denied* 110 S.Ct. 3228, 110 L.Ed. 2d 674 (1990), hereinafter referred to as the "Injunction Case." That decision resulted in the entry of an injunction against the Petitioner which was vacated on March 31, 1995, SEC v Electronics Warehouse, Civil Number H-86-282 (PCD), order dated May 31, 1995, based on a finding that the unforeseen consequences of that injunction (*i.e.*, the disbarrment of the Petitioner by the Florida Supreme Court) constituted fundamental unfairness, and on the finding that the Petitioner's practice of law did not constitute an unacceptable risk to the public (hereinafter referred to as the "Vacater Decision"). A copy of the Vacater Decision, which is believed to be unpublished, is included in the Appendix.

Fifth and Fourteenth Amendments to the United States Constitution.

Florida Constitution, Article One, Section One, Florida Constitution, Article One, Section Two, Florida Constitution, Article One, Section Sixteen.

Statutes

Final Decisions of Courts of Appeal, 36 Stat. 1157, 28 U.S.C. Section 1254 (June 27, 1988). Securities Exchange Act of 1934, as amended, Section 10(b). The Florida Evidence Code, Florida Rules of Court, West Publishing Company, 372 So.2d 1369 *et. seq.* (1979), as amended: Section 90.203, Section 90.616(c).

Federal Rules of Appellate Procedure

Rule 46(b).

Rules Promulgated by the Securities and Exchange Commission

Rule 436 of Securities and Exchange Commission Regulation C, Rule 436(e) of Securities and Exchange Commission Regulation C, Rule 2e of the General Rules of the Securities and Exchange Commission, Item 24 of Exhibit Schedule in Item 601 of Securities and Exchange Commission Regulation S-K.

Florida Bar Rules

Rules Governing the Florida Bar ("R.Reg.F.B."), Florida Rules of Court, West Publishing Company, 494 So.2d 977 *et. seq.* (1987), as amended: Rule 3-7.4(k), Rule 4-3.7, subsections (1), (2) and (3). Former Florida Bar Code of Professional Responsibility: DR 1-102(a)(1), DR 1-102(a)(6).

IV. STATEMENT OF THE CASE

Course of Proceedings & Disposition in the Court Below

On or about January 5, 1994, the Respondent, through the Honorable Miguel J. Cortez, its Clerk, issued an order to show cause requiring Mr. Calvo to demonstrate why he should not be disbarred by the Respondent, based on his disbarrment by the Florida Supreme Court. On or about January 24, 1994, Mr. Calvo filed a lengthy response to the order to show cause, respectfully requesting, based on constitutional grounds, that the Respondent refer the matter to its grievance committees and independently determine Mr. Calvo's fitness to practice law.

On or about April 21, 1995, Mr. Calvo supplemented his response by filing a copy of his petition for writ of certiorari to the United States Supreme Court, as well as calling the following matters to the court's attention:

> "In addition to the foregoing, the Respondent requests that the persons responsible for determinations in this matter note that the legal theory underlying the alleged violations which led to discipline of the Respondent in the State of Florida, based on a prior injunction and Securities and Exchange Commission discipline, was recently rejected by the United States Supreme Court in the [Central Bank Case]. They are also asked to note that, according to Securities and Exchange Commission Commissioner Richard Y. Roberts, in light of the [Central Bank Case], the Securities and Exchange Commission "has already determined that it will refrain from asserting aiding and abetting liabilities except where expressly provided by statute." See CCH F.Sec.L.R., Update Pamphlet Number 1611, June 1, 1994, at pages 7 and 8.
>
> Based on the foregoing, not only should discipline not be imposed by this Court, but the Court should note that Respondent has for almost a decade, been subjected to improper sanctions, discipline and suffering.
>
> As an aside, the Court is asked to note the recent decision of the United States District Court for the District of Mas-

sachusetts (the Boston Office of the Securities and Exchange Commission prosecuted the injunction action against the Respondent) in the case of Austin v Bradley, Barry & Tarlow, CCH F.Sec.L.R., Paragraph 98,219 (current developments, summary in CCH F.Sec.L.R., Update Pamphlet Number 1611, June 1, 1994, at page 5), where the Court found that a New England law firm's knowing failure to disclose the insolvency of their client in a private placement memorandum (including legal opinions that they prepared) was not a violation of federal securities laws because the firm was required to maintain the confidentiality of such information under bar imposed ethical obligations.

While the Respondent did not, in fact, know of any improprieties, the Florida Supreme Court's decision rejected the argument that attorney client privilege would have precluded the Respondent from disclosing client confidences, even had he been aware of the true facts in the Injunction Case. But for that position, the Respondent is of the belief that the Florida Supreme Court would have had to determine, as did the United States District Court for the District of Massachusetts, that even if the facts were as the Florida Bar alleged, the Respondent would have been precluded from taking the actions the Florida Bar claimed were required."

During June of 1995, Mr. Calvo again supplemented his response to the order to show cause by filing a copy of the Vacater Decision by the United States District Court for the District of Connecticut[5] dated May 31, 1995, vacating the injunction against Mr. Calvo on which the decision by the Florida Supreme Court was based.

After more than twenty months and without having conducted any hearings, received any filings in opposition to Mr. Calvo's allegations or, to the best of Mr. Calvo's knowledge, having held any proceedings, Mr. Calvo was served with an order of disbarrment on or about August 30, 1995 (the order having been filed on August 21, 1995).

---

5. Hereinafter referred to as the "USDC Connecticut."

Statement of the Underlying Facts[6]

Florida Bar proceedings were initiated against Mr. Calvo during 1987;[7] however, Mr. Calvo was never advised of their initiation or of the identity of the complainant. During the summer of 1988, Mr. Calvo was notified that a complaint was being referred to Grievance Committee 17(c) for investigation and Mr. Calvo immediately turned over all his Warehouse files to the attorneys appointed to investigate the matter.[8] During June of 1989, the Grievance Committee held an evidentiary hearing; however, it refused to grant a continuance requested by Mr. Calvo's attorney as a result of which Mr. Calvo was unrepresented by counsel (C-11).[9]

The Florida Bar presented its case and witnesses; however, the Grievance Committee did not permit Mr. Calvo to rebut due to the lateness of the hearing and instructed him to prepare a written submission which it would consider and thereafter reconvene to provide Mr. Calvo an opportunity to respond to questions. Mr. Calvo prepared and filed a submission but the Grievance Committee never reconvened to question him; rather, it appears that one or more of its members reached a decision during September of 1989, which was neither put in writing nor communicated to Mr. Calvo (C-11, C-12).

In 1990, Mr. Calvo contacted the Florida Bar to ascertain his status. By written certification he was informed that he was in good standing whereupon he returned to Florida[10] and re-established his legal practice. He heard nothing from the

---

6. The statement of the facts is taken, in materially identical form, from Mr. Calvo's petition for writ of certiorari filed with this Court in conjunction with the Florida Supreme Court decision, a copy of which was filed by Mr. Calvo with the Respondent in support of his response to the order to show cause. References thereto shall be by the letter "C" followed by the page of the petition for writ of certiorari on which the subject facts were alleged.

7. Florida Bar case number 87-21,392(17C).

8. Those files were lost by the Florida Bar.

9. The Florida Bar took the position that Mr. Calvo did not have a right to attend the hearing, to legal counsel thereat, to cross examine witnesses or to testify; rather, the Florida Bar claimed that all of such activities, if permitted, would be at the sufferance of the Florida Bar.

Florida Bar until August of 1991, when he was served with the initial complaint (C-12).

The complaint was served within weeks after Mr. Calvo entered an appearance participating in the appeal of a Warehouse related Commission decision against the Warehouse underwriter (C-12). Mr. Calvo has always believed that it was filed, at such time, in order to impair his ability to participate in such proceeding, at the instigation of a major Florida financial institution. The strategy for defense established by Mr. Calvo involved placing the blame for the Warehouse matter on such financial institution.

The case in question was an appeal to the Respondent of the Securities and Exchange Commission's decision in The Continued Association of Gallagher & Co. & Russell & Laura K. Gallagher, Securities and Exchange Commission Administrative Cases Number 3-6953 and 3-6907, Exchange Act Release Number 29244; reported at 91 CCH Dec., F.Sec.L.R. Paragraph 84,828, Gallagher & Co., Russell K. Gallagher and Laura K. Gallagher v Commission, Appeal Number 91-5476 (11th Cir. 1992), *rehearing denied* (the "Gallagher Case"). During oral argument in such case, James A. Brigagliano, Esquire, one of the attorneys for the Securities and Exchange Commission, responding to a question from the bench, unequivocably stated that Mr. Calvo had provided neither oral nor written opinions authorizing the closing on the Warehouse offering.

The initial complaint had been hastily drafted and was never signed by the presiding officer of the Grievance Committee that purportedly authorized it (he did not even see it until September of 1992, more than one year after the complaint was filed, and more than three years after he was supposed to

---

10. During April of 1989, Mr. Calvo and his family moved to North Carolina, where they bought and operated a country inn. After conclusion of the two year bar on practice before the SEC [rendered inappropriate based on this Court's decision in the Central Bank Case], Mr. Calvo decided to resume his legal practice. He initially decided to return to New York, but, based on information as to his status provided by the Florida Bar, his wife requested that the family return to Florida, which they did during December of 1990, despite the fact that such move resulted in the loss of the country inn (an investment of more than $400,000).

have approved it).[11] The initial complaint contained numerous counts that had to be dropped during the summer of 1992, when counsel for the Florida Bar discovered that they had never been authorized and would have involved *ex post facto* enforcement of rules subsequently adopted (C-12, C-13).[12]

The complaint, as eventually amended, alleged violations of two rules of the former Florida Bar Code of Professional Responsibility, DR 1-102(a)(1) and DR 1-102(a)(6).[13] The first prohibited violation of any disciplinary rule, and the second read as follows: "A lawyer shall not "[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The Florida Bar filed a motion to limit issues at trial to that of discipline, claiming that a violation of Commission Rule 2e was an automatic violation of undefined Florida disciplinary rules. The referee granted the motion but Mr. Calvo appealed to the Florida Supreme Court which rejected the decision and ordered a *de novo* hearing (C-13, C-14).[14]

During the proceeding, Mr. Calvo's ability to obtain meaningful discovery was circumvented by the referee's lack of jurisdiction over the Commission, which provided assistance solely to the Florida Bar, and by the Florida Bar's refusal to cooperate in discovery. Mr. Calvo filed motions to compel discovery but the referee instead granted the Florida Bar's motions for protective orders, as a result of which Mr. Calvo's discovery was limited to five interrogatories. The Florida Bar lost the files originally provided by Mr. Calvo during the investigative stage of the proceeding and also lost its own files for the initial two years of the action. During the ensuing seven years

---

11. The Florida Bar rule governing the subject proceeding, Rule 3-7.4(k), required that the complaint be promptly prepared, signed by the chairman of the grievance committee and promptly served, with proceedings to be concluded, if reasonably possible, within six months thereafter.

12. In fact, the Florida Supreme Court's decision was based exclusively on the dropped counts and therefore constituted a constitutionally prohibited unnoticed charge, see Wilkes II, 782 F.2d. 918 (11th Cir. 1986).

13. Hereinafter referred to as "DR 1-102(a)(1)" and "DR 1-102(a)(6)," respectively.

14. After a resulting delay of one year.

most potential witnesses had disappeared or were outside of the referee's jurisdiction (C-14, C-15).

Immediately prior to the final hearing, Mr. Calvo filed notices required under Florida law for taking of mandatory judicial notice.[15] However, the Florida Bar opposed them and the referee refused to take judicial notice of the requested matters (*e.g.*, the Gallagher Appeal and the record thereof) or to admit any of the evidence involved (C-15).

When the hearing convened, Mr. Calvo introduced his attorney, G. Richard Chamberlin,[16] and his law partner, Larry D. Houston, who was to assist Mr. Chamberlin.[17] Florida Bar counsel demanded that they be precluded from participating at the final hearing because Mr. Calvo had previously proceeded on a *pro se* basis. He also objected to Mr. Chamberlin because Mr. Calvo had indicated that he intended to call Mr. Chamberlin as a witness (C-15).[18]

The referee determined that Mr. Chamberlin could either be a witness or Mr. Calvo's attorney whereupon Mr. Calvo stated that he would require Mr. Chamberlin as an attorney to cross examine Bremer (expected to be the Florida Bar's principal witness). Counsel for the Florida Bar then asserted that he intended to call Mr. Chamberlin as a rebuttal witness and

---

15. Principally involving prior Warehouse related judicial and administrative proceedings, including the Gallagher Appeal to this Court (where the Commission took the position that Mr. Calvo had provided neither oral nor written opinions authorizing the Warehouse closing), testimony that would have been permitted by a party's attorney under Section 90.203 of the Florida Evidence Code.

16. Who had successfully represented Mr. Calvo in In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990) (hereinafter referred to as the "2e Case") and had represented the Gallaghers in their Warehouse related proceedings.

17. With reference to technical evidentiary matters.

18. In light of the referee's refusal to take judicial notice of the proceedings in the Gallagher Appeal, Mr. Calvo intended for Mr. Chamberlin to testify that, during oral argument before the U.S. Court of Appeals for the 11th Circuit, counsel for the Commission had, in response to a question from the bench, asserted that Mr. Calvo had provided neither an oral or written opinion authorizing closing on the Warehouse offering. Testimony that the Florida Bar could not have contradicted. Such testimony should have been permitted under Rule 4-3.7, subsections (1), (2) and (3) of the R.Reg.F.B.

demanded that Mr. Chamberlin be barred from the proceeding.[19] The referee agreed and Mr. Calvo was left without his attorney.[20] Notwithstanding the claims of counsel for the Florida Bar, it did not call Mr. Chamberlin as a witness or even speak to him about such role. In order to preserve his rights on appeal, Mr. Calvo also refrained from calling Mr. Chamberlin as a witness (C-16, C-17).

At the final hearing the Florida Bar presented five witnesses, Edward Bremer, Marvin Richmond,[21] James Beasely,[22] Joseph Caruncho[23] and the presiding officer of the grievance committee. The testimony of Messrs. Richmond and Caruncho corroborated Mr. Calvo's version of the events and contradicted that of the Florida Bar's prime witness, Bremer. Bremer's testimony was also contradicted by transcripts of sworn testimony provided to the Commission by Gary Granai,[24] and by transcripts of conversations Bremer had taped and which the United States Justice Department had transcribed.[25] The decision of the referee was, however, principally based on two final judgments introduced by the Florida Bar as "evidence" at the final hearing, over Mr. Calvo's objections: the final judgment in the Injunction Case and the final judgment in the 2e Case. Mr. Calvo's objections were based on the fact that both

---

19. But see Section 90.616(c) of the Florida Evidence Code, pursuant to which Mr. Chamberlin should not have been excluded.

20. The referee refused to bar Mr. Houston from the proceeding; however, Mr. Houston was utterly unfamiliar with the case, the applicable law, or the potential witnesses. Mr. Houston was then required to immediately proceed with the hearing.

21. The person who was repaid for a loan to Bremer from offering proceeds.

22. An "expert" witness on the issue of underwriter's counsel.

23. A former associate in the Calvo Firm.

24. Warehouse's attorney.

25. Mr. Calvo was not permitted to introduce the copy of such transcripts, which he had obtained from the Warehouse underwriter, rather, he was limited to asking Mr. Bremer if the materials refreshed his recollection, in connection with cross examination questions based thereon. Mr. Calvo had intended to enter selected portions of such transcripts, however, the Commission, which had custody of the originals, refused to provide or authenticate them, even when the referee ordered the Florida Bar to use best efforts to obtain them for the hearing.

judgments were based on a mere preponderance of the evidence while Florida Bar proceedings required proof by the higher "clear and convincing" standard(C-17, C-18).[26]

During the hearing, over the objections of Mr. Calvo, the Florida Bar was allowed to introduce multi-stage hearsay evidence by Bremer[27] and to prove that Mr. Calvo had acted as counsel to the underwriter[28] throughout the Warehouse offering[29] by expert testimony[30] to the effect that Commission rules (which could not be cited)[31] made legal counsel to an underwriter an expert for purposes of registration statement liability, that such counsel was consequently required to file a written consent to the use of its name in a registration statement, and therefore could only be replaced through a formal amendment to the registration statement.[32] Since no amend-

---

26. Both judgments were based on aider and abettor liability under Section 10(b) of the Securities Exchange Act of 1934, as amended, a doctrine rejected by this Court in the Central Bank Case.

27. Concerning what Granai had allegedly told him that Mr. Calvo had said third parties had said they would do, despite the fact that the purported declarants were readily available as witnesses, living in the district in which the hearing was held. The due process clause unquestionably guarantees to a defendant the right to cross examine the governments witnesses, and that right is violated when such witnesses are not presented, but rather, the evidence is presented through multi-stage hearsay. See, *e.g.*, United States v Grande 620 F.2d 1026, at 1035 (4th Cir., 1980).

28. The referee and the Florida Supreme Court both decided that Mr. Calvo had represented both the underwriter and Warehouse in the offering, based on the allegations of the Florida Bar and the testimony of its expert witness, despite Bremer's testimonial admission that Mr. Calvo had never represented Warehouse.

29. No evidence to that effect was testified to by the underwriter, whom Florida Bar counsel declined to call as a witness, or by Mr. Calvo, the only two parties in a position to resolve the issue.

30. His expertise was based on having participated in up to five underwritings as counsel to the underwriter, none of which involved a small offering subject to the rules that applied to the Warehouse registration statement.

31. In fact, he was unable to to cite to any statute, rule or case, other than to the item 24 of the exhibit schedule in Item 601 of Commission Regulation S-K, which, in fact, is the subject of Commission Rule 436.

32. The expert's testimony was diametrically opposed to the actual rule (Commission Rule 436, which specifies as follows in subsection (e) thereof: "Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity."

ment had been filed removing Mr. Calvo's name as counsel to the underwriter, he testified that Mr. Calvo remained responsible for the conduct of the entire offering (C-18, C-19, C-20).[33]

Mr. Calvo's rights to due process were violated by the Florida Bar's loss of his files, its alleged loss of its own files, the referee's protective order limiting Mr. Calvo's ability to conduct discovery, and, the lengthy, unexplained and un-excused delay by the Florida Bar in bringing the proceeding;[34] by the expulsion of G. Richard Chamberlin, Esquire, his attorney (Mr. Houston[35] did not present any witnesses other than Mr. Calvo, since he was totally unfamiliar with their potential testimony,[36] and did not introduce any materials refuting the expert witness because he was totally unfamiliar with the applicable law);[37] and they were violated by the vagueness of the rules he was charged with violating, which made preparation for defense virtually impossible since the rule covered virtually anything the Florida Bar might subjectively deem inappropriate (C-20, C-21).

Mr. Calvo's rights to due process were violated by the refusal of the referee, based on the Florida Bar's objections, to permit Mr. Calvo to introduce evidence of the detailed studies and reports concerning the responsibilities of securities lawyers

---

33. Notwithstanding the fact that he received no fee for such function and that another law firm did. See, *contra*, the Central Bank Case, *supra*.

34. Throughout the proceeding, all of the Florida Bar's substantive witnesses claimed an inability to recall events, when cross examined.

35. Who was required to immediately assume the defense, without any time for preparation or consultations with Mr. Calvo.

36. Affidavits contradicting all of Bremer's hearsay allegations were provided from the purported declarants, following the final hearing as supplements to the record, but were rejected by the Florida Supreme Court. In all but one case, the declarants resided in the district in which the Florida Bar's prosecuting office was located and all were readily available for questioning or presentation by the Florida Bar. The single out of state affiant had offered to make herself available to the Florida Bar, as it required.

37. The most important and irrefutable contradictory evidence being the text of Commission Rule 436(e), and the following materials describing the role of securities lawyers by the Florida Bar, itself: The lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46.

published by the American Bar Association and the Association of the Bar of the City of New York (C-21).[38]

Mr. Calvo's rights to equal protection and due process were violated by improper allusions by Florida Bar counsel to Mr. Calvo's birth in the Republic of Colombia followed by citations to disciplinary actions against attorneys involved in narcotics trafficking, implying, that although not charged, as a Colombian, Mr. Calvo was obviously involved in illegal activities (C-22).[39]

During December of 1992, the referee found Mr. Calvo guilty of all allegations made by the Florida Bar, even where no supporting evidence had been introduced[40] and agreed with the Florida Bar that because of aggravating factors[41] Mr. Calvo should be disbarred.[42] In addition, despite the fact that the Florida Bar had been forced to dismiss most of its counts against Mr. Calvo and had been reversed by the Florida Supreme Court on the product of its initial year of litigation (the motion to limit issues at trial), the referee awarded all costs[43] to the Florida Bar C-22, C-23).

---

38. American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980). Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977). Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37 The Business Lawyer* 915 (1982). *Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979)*, 35 The Business Lawyer 605 (1980).

39. Such vague implications could indeed have been covered by DR 1-102(a)(6), which could be interpreted to make it improper to have been born in Colombia, or to represent, usually on a *pro bono* basis, Colombian immigrants.

40. *E.g.*, motivation, characteristics of alleged victims, likelihood of future violations, bad character, *etc.*

41. Again as to which no evidence was introduced, other than the allegations made by Florida Bar counsel during closing arguments.

42. Such request was not included in any pleadings and was first raised, to Mr. Calvo's dismay, during closing arguments by the Florida Bar.

43. More than $7,000.

Mr. Calvo filed a petition urging the Florida Supreme Court to reject the referee's findings of fact, conclusions of law and recommendations and in support thereof filed a brief, reply brief[44] and a number of motions for permission to supplement the record. The Florida Bar filed motions to strike the Appeal Briefs, a responsive brief, and objections to any attempts to supplement the record pointing out that any problems therewith were the result of tactical or strategic error's in the presentation of Mr. Calvo's case.[45] At oral argument before the Florida Supreme Court counsel for the Florida Bar claimed that notwithstanding the clarity of the record on such point, Mr. Calvo had elected to use Mr. Chamberlin as a witness rather than as his attorney and that Mr. Chamberlin's expulsion was not based on Florida Bar counsel's intent to call Mr. Chamberlin as a witness (C-23, C-24).[46]

On December 16, 1993, the Florida Supreme Court adopted the recommendations, findings and conclusions of the referee and in a strongly worded decision concluded that Mr. Calvo had represented all of the parties to the Warehouse offering and in such role, was responsible for the sale of the securities offered and for all of the information in the Warehouse registration statement. The decision adopted the conclusions of the Florida Bar's expert witness and ignored all of Mr. Calvo's due process and equal protection arguments. Mr. Calvo then filed the Rehearing Motion in which he expanded on his constitutional arguments. The motion for rehearing was denied without comment on February 10, 1994 (C-24).

---

44. The brief and reply brief are hereinafter referred to as the "Brief" and the "Reply Brief" and collectively as the "Appeal Briefs."

45. While at the same time, denying that Mr. Calvo had been prejudiced by the expulsion of Mr. Chamberlin.

46. Mr. Chamberlin, upon learning of such allegation, immediately wrote to the chief justice of the Florida Supreme Court, providing supporting affidavits from Mr. Calvo and Mr. Houston, denying the claims of Florida Bar counsel. Florida Bar counsel responded by characterizing such letter as an improper attempt to influence the Court.

Standard for Review

The standard for Review in this appeal should be whether or not, in light of constitutional requirements, the Respondent has abused its discretion.

V. REASONS FOR GRANTING WRIT

The underlying subject matter has been the subject of actions before the USDC Connecticut,[47] the Securities and Exchange Commission,[48] the Respondent,[49] the United States District Court for the Southern District of Florida, the U.S. Court of Appeals for the Fifth Circuit[50] and the Florida Supreme Court. A number of such decision reached inconsistent results.[51]

A review of the Respondent's decision by this Court is needed to firmly establish that federal courts are bound by the due process guarantees of the Fifth Amendment to the United States Constitution. It will be useful for this Court as a vehicle to explore the consequences that should apply in subsequent proceedings when the law or facts on which a prior action regulating conduct is based, have been, during the interim, been found to be in error.

---

47. The Injunction Case and the Vacater Decision.

48. The 2e Decision and the Gallagher Administrative Decision.

49. The Gallagher Appeal and the pending disbarrment of the Petitioner. Also, an appeal of the United States District Court for the Southern District of Florida's action is pending before the Respondent, William A. Calvo, III v United States District Court for the Southern District of Florida, Appeal Number 95-4230 (hereinafter referred to as the "USDC Appeal").

50. The pending disbarrment action under appeal.

51. Based on differing interpretations of the responsibilities imposed on Mr. Calvo in the Warehouse offering by applicable federal securities laws, all of which run counter to this Court's recent decision in the Central Bank Case, *supra*.

VI. ARGUMENT

Summary

The Respondent is bound by the guarantees of due process and equal protection imposed by the Constitution of the United States.[52] In that regard, Mr. Calvo was entitled to a meaningful ability to defend himself.[53] In the case below, Mr. Calvo challenged the constitutionality of the decision by the Florida Supreme Court, on which the order to show cause was based, and demanded a hearing. In June of this year, Mr. Calvo added to his argument the conclusions of the court which had initiated the entire series of Warehouse proceedings by filing a copy of the Vacater Decision.

The court failed to provide Mr. Calvo with any due process protection, but rather, relying solely on the challenged judgment of the Florida Supreme Court and ignoring major material subsequent developments,[54] reached its decision, despite the fact that no filings were made in the proceeding by anyone challenging Mr. Calvo's response to the order to show cause. Consequently, it abused its discretion and its judgment must be reversed.

Argument

The case of Tyler v Vickery, 521 F.2d 1089 (5th Cir. 1975) established the rule in the Eleventh Circuit[55] that regulators may not conserve or allocate a right to practice law[56] or restrict

---

52. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process. In Harrell v Tobriner, 279 F.Supp 22 (D. D.C., 1967), the court made it clear that the practice of law is a right, rather than a privilege and that regulatory authorities could not restrict constitutionally guaranteed rights for mere administrative convenience.

53. In Davis v United States, 415 F.Supp 1086 (D. Kan. 1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings, requiring the rejection of the factual findings. The case specifically deals with attorneys, at pages 1091 and 1092.

54. The decision of this Court in the Central Bank Case and the Vacater Decision.

55. See Bonner v City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

the practice of law in violation of rights to due process and equal protection under the United States Constitution.[57] Statutes or rules that govern conduct must "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application."[58] This Court specifically addressed the issue in the context of regulation of the practice of law,see NAACP v Button, 371 U.S. 415 (1963).[59]

In Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), this Court struck down the replevin statutes of numerous states, including the State of Florida, because of their constitutionally inadequate notice and hearing provisions. This Court has held that the fundamental requirement of due process is opportunity to be heard at a meaningful time and in a meaningful manner, see Matthews V Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976).

The ability of a person to obtain a fair hearing is more difficult in a setting such as that presented below, where the court acts as prosecutor, witness and judge. In such cases the court must carefully monitor its agents to assure that they respect constitutional guarantees. Mr. Calvo raised sufficient issues in his response to the Respondent's order to show cause to require that he not be disbarred. His allegations were not refuted by anyone, no further pleadings or motions of any kind having

---

56. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

57. "A State cannot exclude a person from the practice of law ... in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," Tyler v Vickery, *supra.*, at 1103.

58. See Baggett v Bullitt, 377 U.S. 360 (1964); Keyishian v Board of Regents, 385 U.S. 589 (1967); Watkins v United States, 354 U.S. 178 (1957); Lovell v City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed.2d 949 (1938), Thornhill V Alabama, 310 U.S. 88 (1940); Talley v California, 362 U.S. 60 (1960); Edwards v South Carolina, 372 U.S. 229 (1963); Cox v Louisiana, 379 U.S. 536 (1965); and. Brown v Louisiana, 383 U.S. 131 (1966).

59. The Florida Supreme Court acknowledged such concept, see Southeast Aluminum Supply Corp. v Metropolitan Dade County, 533 So.2d 777 (Fla. 3rd DCA 1988).

been filed. Consequently, Mr. Calvo was at least entitled to a hearing (which he did not receive) including all rights constitutionally guaranteed in conjunction therewith.

Binding Decision's on Point

As stated by this Court, although a state bar membership is required for federal bar membership, state court disbarrment cannot automatically trigger federal court disbarrment. However, unless the state disciplined attorney *makes a prima facie showing* [emphasis added] that the state proceedings were so devoid of notice or proof that they were unreliable, or that federal disbarrment would amount to a grave injustice, the federal court should not look behind the state-court judgment ...." See Thread v United States, 354 U.S. 278, 281; 77 S.Ct. 1274, 1276 (1957); In re Disbarrment of Isserman, 345 U.S. 286, 288, 73 S.Ct. 676 (1953); In re Ruffalo, 3901 U.S. 544, 547, 88 S.Ct. 1222, 1224 (1968).

A federal court should disregard disbarrment by a state court if any of the following conditions are demonstrated:

> "(1) That the state procedure from want of notice of opportunity to be heard was wanting in due process; (2) that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on the subject; or (3) that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except on the conviction that, under the principles of right and justice, we were constrained to do so."

Selling v Radford, 243 U.S. 46, 51, 37 S.Ct. 377 (1917); see also In re Wilkes, 494 F.2d 472, 476-77 (5th Cir. 1974).

The materials filed by the Petitioner with the Respondent clearly and adequately established a prima facie case requiring the Respondent to refrain from disbarring the Petitioner. This is especially true since his presentation was totally and completely unchallenged by contrary evidence. The Petitioner may

have had the burden of going forward with the evidence, but having met such burden, the Respondent bore the burden of refuting the evidence presented. It did not do so, rather, the Respondent automatically disbarred the Petitioner, in violation of the governing requirements.[60]

Petitioner's Prima Facie Case Below

In his response to the Respondent's order to show cause, the Petitioner asserted the following grounds for rejecting the decision of the Florida Supreme Court:

A. **Lack of Notice**

Lack of notice existed for a number of reasons, most importantly because:

1. All fraud related allegations in the Florida Bar's complaint had been voluntarily dismissed prior to the hearing; however, the final hearing dealt only with allegations (albeit unsupported by the evidence) dealing with purported fraud.

2. The Petitioner was not provided with notice of the grievance committee decision nor does there appear to be any written contemporaneous evidence of such decision. Indeed, the grievance committee failed to provide the Petitioner with a promised opportunity to rebut the allegations of the Florida Bar at a reconvened meeting.[61]

3. Notice must be adequate. In the Florida Bar Case, the only notice was service of the complaint after the Petitioner had been led to believe that the matter had been dropped. As a result, the Petitioner no longer had any in-

---

60. Based exclusively on the refusal by this Court to grant the Petitioner's petition for certiorari in the Florida Bar Case.

61. The original meeting had been adjourned due to the lateness of the hour after the Florida Bar had presented its case, with the Petitioner having been requested to provide a written rebuttal, to be followed by a further hearing at which the Petitioner would be permitted to address the issued raised. The promised continuation of the hearing was never convened by the grievance committee. Instead, when the Petitioner inquired as to his status, the Florida Bar provided the Petitioner with a written certificate of good standing.

dependent records concerning the case (a matter more than six years old at the time the complaint was filed) and the Florida Bar had lost all of the voluminous records the Petitioner had provided it with during the investigative stage (all original materials involved).

B. **Absence of Intentional Misconduct**

No intentional conduct was involved in the matters that underlie the Warehouse matter, nor was evidence of any kind ever introduced indicating that the Petitioner was guilty of dishonesty, fraud, deceit or misrepresentation. Rather, the USDC Connecticut found that the Petitioner was reckless in believing the representations of the Warehouse principals.[62] The Petitioner was in no manner involved in any securities transactions in conjunction with the Warehouse matter, nor has anyone ever alleged that he was. Therefore, it is not possible that such non-existent transactions involved fraud.[63]

C. **Other Constitutional Arguments**

The respondent in the currently pending appeal of the decision by the United States District Court for the Southern District of Florida to disbar the Petitioner has argued[64] that deprivation of a meaningful opportunity to be heard[65] is not a

---

62. This Court is currently considering the issue of recklessness as a substitute for scienter in Section 10(b) cases. This petition could provide the Court with an instrument to help it arrive at a workable definition of recklessness. In the Injunction Case, the Petitioner was found to have been reckless, despite his efforts to provide for an escrow closing to establish the accuracy of the issuer's representation.

63. The USDC Connecticut found that the Petitioner had a legal responsibility to discover the fraud perpetrated by the Warehouse principals, and that he was reckless in accepting their representations. Not that he was an active participant in the fraudulent conduct.

64. At page 17 of its brief, William A. Calvo, III v United States District Court for the Southern District of Florida, Appeal Number 95-4230 (11th Cir. July 21, 1995). That currently pending appeal is hereinafter referred to as the "USDC Appeal."

The Petitioner addresses the arguments in the USDC Appeal because it is based on identical facts, and no facts or arguments were developed in the proceeding below. Such use of collateral proceedings is justified in order to adequately frame the issues for consideration by this Court.

cognizable basis for rejecting the decision of the Florida Supreme Court. It indicates that only this Court can review state decisions for constitutional infirmities. The argument is without merit. The Respondent was not being asked to overturn the decision of the Florida Supreme Court, rather, it was being asked to decline to accept it as a predicate for its own disbarrment proceedings due to constitutional infirmities. It is fundamental to constitutional government that unconstitutional orders not be enforced. The argument that under the Selling Case, *supra*, constitutional deficiencies do not constitute defects in notice and opportunity to be heard is clearly insupportable.

The respondent in the USDC Appeal argued that there is a lesser standard of constitutional protection for disbarrment proceedings than for other matters, because they are merely "quasi-criminal." In essence, the argument is that the Constitution of the United States protects criminals more than it protects non-criminals and that had the Petitioner's alleged conduct risen to the level of criminality, he need not have been disbarred. That is clearly not correct. All governmental action, whether or not involving criminal matters, must comply with constitutionally imposed due process obligations (*e.g.*, rights to vote, education, welfare, *etc.*).

The respondent in the USDC Appeal argued that the purpose of bar disciplinary proceedings are not punitive but rather, are merely designed to protect the public.[66] While the Petitioner agrees that such rational is the appropriate standard, such standard was ignored in the case below. No evidence that the Petitioner's right to practice law presented any danger to the public was introduced in the Florida Bar action. Substantial evidence to the contrary was introduced. Most meaningfully to this Court's determination, the USDC Connecticut, in its Vacater Decision determined that the continued practice of law

---

65. Which the United States Supreme Court has called the cornerstone of due process, see Fuentes v Shevin, 407 U.S. 67, 303 U.S. 444, 92 S.Ct. 1983, 32 L.Ed 2d 556 (1972).

66. That rational underlies arguments that statutes of limitation are not required, since the decision to disbar an attorney must be justified by the risk to the public at the time of the disbarrment, rather than at the time of the allegedly improper conduct.

by the Petitioner does not present any danger to the public, while curtailment of such right based on its decision in the Injunction Case is fundamentally unfair.

The use by the Florida Bar of disciplinary proceedings against the Petitioner for punitive purposes, in the total absence of any evidence that discipline was required to protect the public and in the face of overwhelming evidence to the contrary was a constitutionally impermissible abuse of government power and cannot form the basis for the decision by the Respondent.

1. **Deprivation of Counsel**

The respondent in the USDC Appeal argued that there is no federally guaranteed constitutional right to counsel in bar disciplinary proceedings and that any right to counsel provided by the Florida Supreme Court was gratuitous, implying that any such right could therefore me manipulated at the whim of the Florida Supreme Court. The argument is without merit.

In the case of Tyler v Vickery, 521 F.2d 1089 (5th Cir. 1975), the Court below specifically found that states may not conserve or allocate a right to practice law; and, that states cannot restrict practice of law in violation of rights to due process and equal protection under federal and state constitutions. "A State cannot exclude a person from the practice of law ... in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," Tyler v Vickery, *supra.*, at 1103.

The Florida Supreme Court was bound by the guarantees of due process and equal protection imposed by the Florida and United States Constitutions.[67] In that regard, the Petitioner was entitled, during the conduct of the Florida Bar proceeding, to a meaningful ability to defend himself.

Due process is guaranteed by Article One, Section Nine of

---

67. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (Fla. 3rd DCA 1984).

the Florida Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense ...." It is amplified by Sections Two and Sixteen thereof to specifically guarantee the right to counsel. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (5th Cir. 1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (Fla. 1960). The guarantees provided in Section One, Article Sixteen, are available to respondents in Florida Bar disciplinary proceedings, see, *e.g.*, Weathers v Davis, 196 So. 487 (Fla. 1940).

The failure of the Florida Supreme Court to provide the Petitioner with his rights under the Florida Constitution constitutes a violation of the Petitioner's rights to due process and equal protection imposed on the states by the Fourteenth Amendment to the United States Constitution. Consequently, the Petitioner did have a federally protected right to counsel in the Florida Bar proceeding, and such right was violated by the unjustifiable exclusion of his attorney from the proceedings.

2. Vagueness of Disciplinary Rules/Ex Post Facto Laws

The respondent in the USDC Appeal argued that there was no constitutional prohibition against ex post facto interpretation of obligations of attorneys. That argument fails because the Florida Bar admitted that it could not enforce ex post facto laws in conjunction with its motion to voluntarily dismiss almost all of the counts originally brought against the Petitioner. Its assertions became the rule of the case when they were adopted by the Referee. To argue that it is constitutionally permissible to establish rules regulating conduct[68] and provide ex post fact enforcement is misguided. Such

---

68. As opposed to tax matters, where the concept of ex post facto laws has been generally accepted.

governmental action is fundamentally unfair and constitutionally prohibited.

The respondent in the USDC Appeal argued that even if the prohibition against ex post facto laws applies, there is no ex post facto problem. Its analysis was flawed since it ignores the fact that the Florida Bar had in publications and mandatory seminars espoused a standard of conduct for attorneys in securities matters diametrically apposed to the decision imposed against the Petitioner. Such published standards meet the "unexpected and indefensible" standard established in Bouie v City of Columbia, 378 U.S. 347, 354; 87 S.Ct. 1697, 1703 (1964).

3. Unnoticed Charges

The substance of the fraud related portions of DR 1-102(A),[69] as incorporated in the successor rules regulating the Florida Bar, had all been included in the original complaint against the Petitioner but were voluntarily dropped over the opposition of the Petitioner. At the final hearing, however, the Florida Bar relied exclusively on allegations of fraud and the decision of the Florida Supreme Court was based exclusively on allegations of fraud. The only counts against the Petitioner left in the Florida Bar proceeding after the voluntary dismissal of all of the fraud based counts involved DR 1-102(A)(6).[70] Based on that argument alone, the Respondent should have declined to disbar the Appellant. See Wilkes II, 782 F.2d. 918 (11th Cir. 1986).

The respondent in the USDC Appeal argued that violation

---

69. The regulatory provision on which the Florida Bar's action against the Petitioner was predicated.

70. The Petitioner's brief to the Florida Supreme Court included the following argument:

> "At the commencement of the final hearing after Mr. Chamberlin's forced departure, Mr. Houston, on behalf of Respondent, moved to dismiss the Complaint in that none of the allegations therein had anything to do with Rules 1-102(A)(1) and 1-102(A)(6) of the old Rules of Discipline, which contemplated activities not otherwise covered by any other disciplinary rules (*e.g.*, drunkenness, child abuse, terrorism, *etc.*). The Referee denied Respondent's motion."

of securities laws (securities fraud) was an adequate independent predicate for bar discipline under DR 1-102(A)(6). However, as acknowledged by the USDC Connecticut in its Vacater Decision, the decision of this Court in the Central Bank Case, *supra* clarified that the Petitioner did not engage in securities fraud,[71] thus the Respondent's observations are misguided.

4. Equal Protection

The respondent in the USDC Appeal asserted that the Petitioner failed to establish a prima facie showing that "he was targeted for prosecution" because of his Colombian ancestry. The Petitioner did not claim that he was targeted because of his Colombian ancestry but rather that the attorney for the Florida Bar, at the final hearing, improperly used the Petitioner's Colombian ancestry as a tool to prejudice the Referee and the Florida Supreme Court against the Petitioner. The Petitioner demonstrated that such efforts bore fruit since a specific finding of fact was included in the Referee's report to the effect that the Petitioner was of Colombian ancestry. The Petitioner further established a prima facie case by demonstrating that counsel to the Florida Bar cited a number of cases involving prosecution of attorneys for narcotics related violations in support of his demand for the Petitioner's disbarrment, despite the fact that there were no allegations of narcotics violations against the Petitioner. Such allegations, demonstrable without question in the record, established the "facts sufficient to raise a reasonable doubt" about the prosecutor's discriminatory tactics.

The respondent in the USDC Appeal further suggested that it was improper for the Petitioner to demonstrate that the discipline imposed by the Florida Supreme Court was not appropriate. That is misguided in light of the purported basis for bar discipline.[72] The issue facing the Respondent was not full faith and credit but rather whether or not the decision of the Florida Supreme Court reflected facts that also posed a danger

---

71. Securities fraud is a technical concept much more broad than the general definition of fraud. There was no indication of any kind by the USDC Connecticut that the Petitioner had engaged in any conduct constituting fraud, as understood outside the concept of securities laws.

72. Protection of the public rather than punishment.

to the public if the Petitioner was permitted to continue the practice of law as a member of its bar. Contrary to the Respondent's misguided observations, a refusal by the Respondent not to discipline the Petitioner would not have reversed or modified the actions of the Florida Supreme Court, and thus would not have constituted direct review of the state court sanction.

5. Cruel and Unusual Punishment

The respondent in the USDC Appeal argued that state and federal governments are free to cruelly and unusually punish their citizens, as long as no criminal proceedings are involved. That is a position that this Court is not likely to accept. The proper purpose of disbarrment "is to protect the court and hence society, as an instrument of justice." However, in the case below, as previously discussed, there was no evidence whatsoever of any danger to society. Rather, as reflected in the USDC Connecticut's Vacater Decision, the Petitioner's continued practice of law poses no cognizable danger to society while the denial of his right to continue practicing law, in the absence of such showing, is "fundamentally unfair." As such, it constituted improperly imposed punishment rather than protection of society and the courts.

6. Laches and Estoppel

The Petitioner asserted that the failure of the Florida Supreme Court to abide by its decisions concerning the applicability of laches and estoppel violated his right to due process and equal protection under both the Constitution of the State of Florida and the Fifth and Fourteenth Amendments to the United States Constitution. As stated before, the Petitioner was not asking the Respondent to reverse the decision of the Florida Supreme Court and order that he be reinstated as a member of the Florida Bar, rather, he demanded that the Respondent refrain from relying on the constitutionally deficient decision of the Florida Supreme Court as a predicate for its own disbarrment action.

The respondent in the USDC Appeal claimed that the doctrines of laches and estoppel do not apply against the government; however, the Florida Supreme Court has specifi-

cally recognized such defenses in bar disciplinary proceedings and established criteria therefor, see Florida Bar v Randolph, 238 So.2d 635 (1970); and, The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978).

7. **Intervening Change in the Law**

The respondent in the USDC Appeal asserted that the decision of this Court in the Central Bank Case, *supra*, did not apply in the case of the Petitioner because the Petitioner had purportedly been found to have been a primary violator of securities laws. The same argument was interposed by the Securities and Exchange Commission in opposition to the Petitioner's motion to vacate the injunction underlying the Florida Supreme Court decision. The argument was soundly rejected by the court[73] in the best position to respond thereto, the USDC Connecticut in its Vacater Decision.[74] It must also

---

73. Which stated that:

"[A]iding and abetting is no longer a basis for Section 10b liability is also pertinent .... The SEC relies on 15 U.S.C. 78(u)(d)(1), which contains no specific language reaching aiding and abetting" that would remove it from the Central Bank Case. The SEC, in support of its argument to enjoin aiders and abettors, cites authority which preceded Central Bank ...."

74. The Petitioner responded to such argument by the Securities and Exchange Commission in his reply memorandum to the USDC Connecticut, as follows:

"The Court is respectfully requested to refer to the original complaint in this action which contradicts allegations that the injunction against the Movant pertains to primary violations of securities laws. Having written the subject opinion, which was based on a motion for summary judgment, the Court is also in the best position to determine whether its decision was based on findings that the Movant had engaged in primary violations of securities laws.

In conjunction with the current allegations of primary liability, the Court is asked to note that the Commission, in its brief, now admits that the Movant did not represent the issuer in the underlying matter. Furthermore, the Court is asked to note the drastically different posture regarding matters involving scienter or recklessness that the Commission itself took in the Gallagher administrative proceeding where it acted as both prosecutor and adjudicative tribunal. That is especially true as to the Movant's misguided efforts to assure verification that the indictment had been dropped and that Bremer had in fact advanced funds to Warehouse, through the Granai trust arrangement. While the Movant was wrong in his belief that such verification procedure was appropriate, the fact that the Commission admitted that such procedure was set in place contradicts the Commission's posture in the instant case that the Movant was aware the indictment had not been dropped.

be rejected in the instant case.

8. Infirmity of Proof Arguments

The standard of proof for Florida Bar disciplinary proceedings is the "clear and convincing" evidence standard, a standard higher than the preponderance of the evidence standard. The respondent in the USDC Appeal argued that evidence inadequate to meet the preponderance of the evidence is adequate to meet the higher "clear and convincing" standard. That is constitutionally inadequate. The only logical and constitutionally consistent theory for the admission of evidence with a standard lower than that permitted in preponderance of the evidence cases is that hearsay is admissible in favor of the defendant, to refute allegations of the prosecuting authority.[75]

In Holman v Washington, 364 F.2d 618 (5th Cir. 1967), the predecessor to this Court dealt with use of prior evidence without a proper foundation. It held that such use was a deprivation of due process under the 5th and 14th Amendments to the United States Constitution, as well as under the applicable state constitution. It indicated that a predicate to use of indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. Such holding should have prohibited consideration of all the hearsay evidence and prohibited the testimony of the Florida Bar's purported expert.

In Davis v United States, 415 F.Supp 1086 (D. Kan. 1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings, requiring the rejection of the factual findings. The case specifically deals with attorneys, at pages 1091 and 1092. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead

---

None of the foregoing matters are consistent with the Commission's current position."

75. In the McCain Case, *supra*, the Florida Supreme Court upheld the referee's finding of fact that hearsay statements were not clear and convincing evidence, regardless of the unquestionable integrity of the witnesses.

him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law," Tumey v State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

9. **Loss of Evidence**

The Petitioner alleged, without contradiction, that the Florida Bar denied him due process by denying discovery and having lost almost all relevant files.

It is not disputed that the Petitioner was denied meaningful discovery since discovery was limited to five interrogatories, after which the Petitioner was precluded from seeking additional information by a protective order in favor of the Florida Bar. It is not disputed that the Florida Bar lost all of the original files that it had obtained from the Petitioner during its investigation. It is not disputed that the Florida Bar advised the Petitioner that he was in good standing, and induced him to leave any Warehouse materials he did have in North Carolina, when he moved back to Florida to resume his interrupted legal career.

When government agencies lose or destroy evidence, the Fifth and Fourteenth amendments to the United States Constitution do not permit them to be the beneficiaries of such actions. The amount of data involved was substantial and material, being "all" of the Petitioner's files. That being the case, the Petitioner adequately described the resulting constitutional infirmities with the Florida Supreme Court decision.

The Fall of the Underlying Actions

Mr. Calvo's disbarrment by the State of Florida was based on the decision in the Injunction Case finding that Mr. Calvo had been reckless in accepting as true representations of Warehouse's president and legal counsel, and that such recklessness supported a finding of aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934, as amended, and of rules promulgated thereunder.

This Court has been careful to limit liability of securities attorneys in cases involving performance of traditional lawyer

functions. In Pinter v Dahl, 108 S. Ct. 2063 (1988),[76] it ruled that the term "seller" did not include attorneys acting within the normal scope of rendering professional legal services. In the recent Central Bank Case, this Court found that the language of Section 10(b) of the Securities Exchange Act of 1934, as amended, did not cover aiding and abetting liability, the predicate on which the Florida Supreme Court's decision was ultimately based.[77]

As importantly, when the USDC Connecticut was apprised of the use of its decision by the Florida Supreme Court, it granted a motion by the Petitioner requesting that the injunction be vacated. The ruling specified that it was based on two factors, both decisively relevant to the decision by the Respondent. First, that based on the Petitioner's conduct during the past decade and the decision of the Securities and Exchange Commission in the 2e Case, it was clear that the Petitioner's continued practice of law did not pose a cognizable threat of misconduct. Second, that the use of the decision for purposes not contemplated when it was issued[78] constituted "fundamental unfairness."

The governing cases establish that in the context of federal securities laws an attorney has no disclosure duties to persons with whom he has no fiduciary relationship. They also establish that performance of traditional lawyer's functions will not form the basis for violations of federal securities laws. See, Schatz, et. al. v Rosenberg, et. al., (4th Cir. 1991), reported at 91 CCH F.Sec.L.R. - Decisions - Paragraph 96,222; and Camp v Dema, et. al., (8th Cir. 1991), reported at 91 CCH F.Sec.L.R. - Decisions - Paragraph 96,291. See also the decision of the Respondent in In re Cascade International Securities Litigation.; CCH F.SEC.L.R. Paragraph 98,110, United States District Court for the Southern District of Florida, Case No. 91-8652-CIV-NESBITT, December 15, 1993.

Based on this Court's decision in the Central Bank Case,

---

76. Interpreting Section 12 of the Securities Act of 1933, as amended.

77. See Twiss *et. al.* v Kury *et. al.*, Appeal Number 92-2475, decided by the Respondent (1994).

78. *I.e.*, as a predicate to disbar the Petitioner.

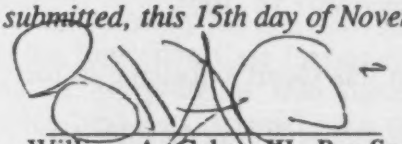
the Respondent should have found that the Injunction Case did not represent law on which it could rely to disbar the Petitioner, regardless of the Florida Supreme Court's interpretation of the applicable law. Based on the Vacater Decision and its specified rationale, the Respondent could not find a justifiable basis for deeming the Petitioner's continued practice of law a public threat justifying his disbarrment,

VII. CONCLUSION

The decision of the Florida Supreme Court is at odds with this Court's interpretations of federal law on point, and such misapprehension should not be allowed to govern the proceeding below. Clearly, the Petitioner established a prima facie case that the Florida Supreme Court proceedings involved such want of notice of opportunity to be heard as resulted in a deprivation of due process; involved such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction that they could not serve as the final conclusion on the subject; and, involved a number of other grave reasons which should have convinced the Respondent that to allow the natural consequences of the judgment to have their effect would conflict with its duty not to disbar except on the conviction that, under the principles of right and justice, it was constrained to do so.

Having gone unchallenged, the required prima facie case was established for purposes of the Respondent's order to show cause. Consequently, the decision of the Respondent disbarring the Petitioner is "fundamentally unfair" and this Court should require the immediate, retroactive re-instatement of the Petitioner as a member of the bar of such court.

Respectfully submitted, this 15th day of November, 1995.[79]



William A. Calvo III, *Pro Se*
11355 Southeast 54th Avenue; Belleview, Florida 34420
(904) 245-4126

---

79. Re-submitted on January 12, 1996, in modified printing format, as required by the Court.

Order to Show Cause

In the U.S. Court of Appeals for the Eleventh Circuit; In the Matter of William A. Calvo, III; Misc. No. 94-1001.

Order of Disbarrment

It has been shown to the Court that the Supreme Court of the State of Florida has disbarred the above-named attorney from practice in that court. Pursuant to Rule 46-1(c)(4) of the Rules of the U.S. Court of Appeals for the Eleventh Circuit, it is ORDERED that said attorney be disbarred from practice in this court effective fourteen days after the date of this order unless this order is sooner modified or stayed.

IT IS FURTHER ORDERED by this Court that said attorney advise the clerk of the court of all pending appeals before this court in which he is the counsel of co-counsel of record.

This 5th day of January 1994.

Michael J. Cortez, Clerk

Order of Disbarment

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-1001

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FILED

AUG 21, 1995

Miguel J. Cortez
Clerk

Proceedings Pursuant to Rule 5 of the
Rules Governing Attorney Discipline in the
U.S. Court of Appeals for the Eleventh Circuit

BEFORE: TJUFLAT, Chief Judge, Edmondson and Carnes, Circuit Judges

BY THE COURT:

Upon consideration of Mr. Calvo's response of January 24, 1994 to this Court's order of January 5, 1994, and of the December 16, 1993 order of the Supreme Court of Florida disbarring Mr. Calvo, it is ORDERED that William A. Calvo, III is disbarred from practice before this Court.

Petitioner's Initial Response

In the U.S. Court of Appeals
For the Eleventh Circuit

In the Matter of
William A. Calvo, III

Misc. No. 94-1001

MOTION FOR DIFFERENT DISPOSITION

COMES NOW WILLIAM A. CALVO, III, *Pro Se* (the "Petitioner"), and, pursuant to the provisions of Rule 46(b) of the Federal Rules of Appellate Procedure (the "FRAP") and Eleventh Circuit Rule 46-1(c)(4), respectfully requests that this Court determine for itself, based on the procedures described in Eleventh Circuit Rule 46-1(2), the Petitioner's fitness to practice law before it, notwithstanding the current, non-final, determination of the Supreme Court of the State of Florida (the "Florida Bar Case").

Filed herewith in support of this Motion are a copy of the Petitioner's currently pending motion to the Supreme Court of Florida requesting a rehearing (the "Pending Motion for Rehearing"), a copy of the Petitioner's original brief to the Florida Supreme Court and a copy of the Petitioner's original reply brief to the Florida Supreme Court.

As grounds in support of this Motion, the Petitioner states as follows:

A. PRIOR DETERMINATIONS OF THIS COURT

1. This Court has previously addressed the facts underlying the decision by the Florida Supreme Court, in the case of Gallagher & Co. v SEC; Appeal Number 91-5476, decided by this Court on May 5, 1992 (the "Gallagher Case").

2. During oral argument before this Court on the morning of April 21, 1992, counsel to the Securities and Exchange Commission unequivocally, in response to a direct question from the bench, stated that William A. Calvo, III, had not provided either an oral or written opinion authorizing the closing which was the subject matter of that case (the "Warehouse Closing").[80]

3. The Warehouse Closing was also the subject matter of the Florida Bar Case, as well as of the two decisions (the "Prior Warehouse Actions") on which such Court almost exclusively relied in reaching its conclusions.[81] However, the Prior Warehouse Actions were based on a motion for summary judgment at which neither evidence nor testimony was considered, and, the factual basis therefore was contradicted by both the assertion of counsel to the Securities and Exchange Commission in the Gallagher Case and almost all of the evidence at the hearing on the Florida Bar Case. Furthermore, the Florida Supreme Court ignored critical conclusions of the Securities and Exchange Commission judge who decided the 2e Action, *to wit*, that Mr. Calvo had been deceived by both Mr. Bremer and the Warehouse attorney, Mr. Granai, and that a permanent suspension was not warranted.[82]

---

80. Such admission was diametrically opposed to the allegations of the Florida Bar in the Florida Bar Case, although the Florida Bar introduced no evidence in support thereof. Based on such focal factor, this Court is urged to acknowledge that the conclusions of the Florida Bar Case are not correct.

81. The two decisions being SEC v Electronics Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988), hereinafter sometimes referred to as the "Injunction Action"; and, In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990) hereinafter sometimes referred to as the "2e Action".

4. The Florida Bar was successful in excluding evidence of the proceedings before this Court in the Gallagher Case during the hearing which resulted in the Florida Bar Case decision, thus, the admissions of the Securities and Exchange Commission which should have led to fundamentally different conclusions were not reflected in the decision.

5. It would be manifestly unfair and violative of the Petitioner's rights to due process guaranteed by the Fifth Amendment to the Constitution of the United States of America to disbar him from this Court without opportunity for a hearing at which this matter could be considered.

B. CONSTITUTIONAL DEFICIENCIES IN THE FLORIDA BAR CASE

I. Introduction

1. The Petitioner has filed a motion for rehearing with the Florida Supreme Court in which he has detailed numerous and egregious constitutional deficiencies in the proceedings underlying such decision. Additional constitutional deficiencies and arguments applicable to the Florida Supreme Court's decision in the Florida Bar Case are contained in the brief and reply brief filed by the Petitioner with the Florida Supreme Court in the Florida Bar Case, and are supported by voluminous materials contained in a three volume appendix filed with the subject reply brief. The Petitioner will also, if the motion for rehearing is not successfully concluded, file a petition for certiorari with the United States Supreme Court.

2. Copies of the Pending Motion for Rehearing, the Petitioner's original brief and the Petitioner's reply brief filed in the Florida Bar Case have been filed in support of this Motion and the arguments reflected therein are incorporated by reference hereto. The Pending Motion for Rehearing, brief, reply brief and appendix filed with the

---

82. This Court is urged to accept the reasoning of Judge Regensteiner in the 2e Action, and to note that the penalty imposed therein was completed more than three years ago.

Florida Supreme Court should form a starting point for investigation of this matter by a master or a grievance committee appointed by this Court.

3. The Pending Motion for Rehearing, brief and reply brief filed by the Petitioner in the Florida Bar Case reflect the following constitutional deficiencies:

II. Deprivation of Right to Counsel

1. The exclusion of the Petitioner's legal counsel from the trial based on a motion by the Florida Bar claiming that it intended to call such counsel as a rebuttal witness[83] violated the Petitioner's rights to due process guaranteed by the United States[84] and Florida[85] Constitutions. Such exclusion, as detailed in the Petitioner's Pending Motion for Rehearing, brief and reply brief filed with the Florida Supreme Court, were critically prejudicial to the Petitioner.[86]

2. It is incontestable that during the trial of the Florida Bar Case, the referee, based on the motion of Bar Counsel and over the strenuous objection of Mr. Calvo, excluded Mr. Calvo's trial attorney, G. Richard Chamberlin,[87] from par-

---

83. Which it failed to do and never discussed with such counsel.

84. See amendments Five, Six and Fourteen to the United States Constitution.

85. Due process is guaranteed by Section One, Article Nine of the Florida Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense ...." It is amplified by Sections Nine and Sixteen thereof to specifically guarantee the right to counsel. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (1960). The guarantees provided in Section One, Article Sixteen, are available to Respondent's in Florida Bar disciplinary proceedings, see, *e.g.*, Weathers v Davis, 196 So. 487 (1940).

86. Such prejudice was impliedly admitted in the Florida Bar's brief to the Supreme Court, where it criticized the Petitioner's conduct of the hearing in not calling rebuttal witnesses or introducing exculpatory evidence.

ticipation or attendance at the hearing. Larry D. Houston, Esquire, another attorney who Mr. Chamberlin intended to use to assist with technical evidentiary issues, was forced to conduct the defense, without any continuance, despite the fact that he knew practically nothing about the case or applicable law, and had never had an opportunity to speak to the numerous witnesses arranged for the trial.

3. The Florida Supreme Court was falsely led to believe by counsel to the Florida Bar during oral argument that Mr. Calvo was offered a choice by the referee in the Florida Bar Case to either use G. Richard Chamberlin, Esquire, as a witness or as his attorney, and that Mr. Calvo elected to use Mr. Chamberlin as a witness, although he was never called for such purpose. In fact, as demonstrated in the letter provided by Mr. Chamberlin to the Chief Justice immediately following the oral argument, Mr. Calvo, when faced with such election chose to use Mr. Chamberlin as his attorney; however, counsel to the Florida Bar indicated that he intended to call Mr. Chamberlin as a rebuttal witness, whereupon the referee disqualified Mr. Chamberlin and ordered him out of the room. A copy of Mr. Chamberlin's letter, together with the affidavits of Mr. Calvo and of Larry D. Houston, Esquire, which accompanied such letter are annexed as exhibit 1-A to the Pending Motion for Rehearing filed in support of this Motion.[88]

4. Mr. Chamberlin was not a witness to any facts material to the proceeding nor did he have any knowledge thereof, except as obtained when acting as legal counsel to either Mr. Calvo during the appeal of the injunction and the 2(e)

---

87. The Court is asked to judicially note that Mr. Chamberlin acted as counsel in this Court's oral argument of the Gallagher Case, and was an expert in the Warehouse case.

88. This Court is asked to note that Mr. Calvo's comments on page 8 of the record, lines 2 to 24, make it irrefutable that it was Mr. Whalen's stated intention of calling Mr. Chamberlin, as a witness, not the non-existent election by Mr. Calvo to do so, that led to his disqualification. It is also asked to note that the fact that Mr. Calvo had formally and on a timely basis, prior to the hearing, advised the referee and Bar counsel that he intended to call Mr. Whalen as a witness, did not impact the ability of the Florida Bar's counsel to participate in the proceeding.

proceeding, or to the Gallaghers, thus, he could not have provided any testimony at the Final Hearing unless Mr. Calvo and the Gallaghers waived their rights to attorney client privilege. Because they did not, there was no basis for the use of Mr. Chamberlin as a witness by the Florida Bar, and, in fact, the Florida Bar never called Mr. Chamberlin as a witness or even interviewed him with that possibility in mind.[89]

5. Mr. Calvo was severely prejudiced by his inability to use Mr. Chamberlin's services, specifically, in that he was left with Larry D. Houston, who had never interviewed any witnesses and was unfamiliar with the facts or law involved,[90] to conduct his defense. Consequently many rebuttal witnesses to Mr. Bremer's testimony (*e.g.*, Ms. Daniels and Messrs. Jenkins, Baldrica and Scherer) were never called to testify, Their examination, and an examination of the financial reports for Messrs. Jenkins, Baldrica and Scherer would have clearly demonstrated that Bremer's testimony that Mr. Calvo assisted or attempted to assist in locating loans to effect a fraudulent closing was totally false. In addition, being unprepared and unfamiliar with the applicable law, Mr. Houston failed to rebut the testimony of the Florida Bar's expert through use of the text of Securities and Exchange Commission rules 436(e) or 478, or the Florida Bar's own materials from the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*.

6. Mr. Calvo specified at the Final Hearing that Mr. Chamberlin was essential to the cross examination of Bremer.[91]

---

89. The referee made no inquiry as to what evidence Mr. Chamberlin was to provide on behalf of the Florida Bar.

90. Assistance of counsel includes consultation and understanding of the accused's case before a trial, a consideration of his special interests in the cross-examination of witnesses and defensive evidence and in the making of argument and otherwise, see Collingsworth v Mayo, 173 F.2d 695 (1949). The denial of a reasonable opportunity to obtain counsel and to confer with him prior to trial is a denial of due process as contemplated by both the Florida and United States Constitutions, see Cash v Culver, 120 So.2d 590 (1960).

91. See pages 7 and 8 of the record of the Final Hearing, copies of which are included in the appendix filed by Mr. Calvo with his reply brief, and are also included as part of exhibit 1-A thereto.

Had Mr. Chamberlin been permitted to act as counsel to Mr. Calvo, he would have, on cross examination of Mr. Bremer, introduced the affidavits filed by Mr. Bremer in the injunction action against Mr. Calvo.[92] Bremer provided the Securities and Exchange Commission with three separate affidavits for use in the Warehouse litigation; however, the Securities and Exchange Commission withheld the first affidavit provided by Bremer because it authenticated the Bremer tapes which the Securities and Exchange Commission wanted to exclude from consideration in conjunction with its motion for summary judgment.[93] The affidavits were included in the joint appendix filed by Mr. Calvo with the U.S. Court of Appeals for the Second Circuit in *Securities and Exchange Commission v Calvo*, 891 F.2d 457 (2d Cir. 1989), at pages A486 through A491 (the "Third Bremer Affidavit"), A685 through A713 (the "First Bremer Affidavit") and A714 through A727 (the "Second Bremer Affidavit").

7. Excerpts from such joint appendix are included as composite exhibit 1-B to the Pending Motion for Rehearing, a copy of which has been filed in support of this Motion. A review of such excerpts demonstrates material differences between them and between them and the testimony of Bremer at the Final Hearing. For illustrative purposes:

   (a) Paragraph 6 of the Second Bremer Affidavit and Paragraph 16 of the First Bremer Affidavit admit that Mr. Calvo was only involved with post effective amendment number one to the Warehouse registration statement.[94]

   (b) Paragraph 16 of the First Bremer Affidavit admits that Mr. Calvo was never counsel to Warehouse.[95]

---

92. With which Mr. Chamberlin, but not Mr. Houston, was totally familiar.

93. As did Bar Counsel in the Florida Bar Case. Those are the same transcripts that the Securities and Exchange Commission was supposed to deliver through Bar Counsel for the hearing, at the instruction of the referee to Bar Counsel, but failed to provide.

94. There were three subsequent post effective amendments filed with which Mr. Calvo was not involved. The last such post effective amendment was the one declared effective.

(c) Paragraphs 24 and 25 of the First Bremer Affidavit authenticate the Bremer Tapes.

(d) Paragraphs 32, 33 and 34 of the First Bremer Affidavit and paragraphs 15 and 16 of the Second Bremer Affidavit concerning knowledge of the correct closing date were totally contradicted by Bremer's testimony at the Final Hearing where he first claimed no one knew about the erroneous closing date, and then, when cross examined as to his discussion of the proper closing date with Manuel Crespo of the Securities and Exchange Commission (and shown his taped transcript of the call), changed his story to indicate that Francesca Daniels had calculated the proper closing date in Mr. Calvo's presence. See also the affidavit of Ms. Daniels denying Mr. Bremer's claim filed with the Florida Supreme Court as part of the appendix to Mr. Calvo's reply brief.

(e) Paragraphs 38 through 42 of the First Bremer Affidavit and paragraphs 21 and 22 of the Second Bremer Affidavit discuss Mr. Calvo's purported role in assisting Bremer to raise emergency loan funds through Messrs. Jordan and Burckhardt and Ms. Daniels, starting in January of 1985, indicating that Mr. Calvo had suggested such loans.[96] At the Final Hearing, Bremer admitted that Messrs. Jordan and Burckhardt and Ms. Daniels had been introduced solely in conjunction with solicitation of legitimate broker dealer participants in the offering (as contrasted with his claims in paragraphs 40 and 42 of the First Bremer Affidavit), and further, that Bremer conceived of the loan plan himself, and, never discussed it with Mr. Calvo, rather, he claimed that his attorney,

---

95. The Florida Supreme Court found, without support in the record other than the erroneous testimony of the Florida Bar's expert (see Securities and Exchange Commission rules 436(e) and 478), that Mr. Calvo represented all of the parties.

96. Such claims were denied by Messrs. Jordan and Burckhardt and Ms. Daniels in affidavits filed in the Injunction Action.

Granai explained the proposed Bremer stock purchases to Mr. Calvo on April 19, 1985.[97]

(f) In paragraph 55 of the First Bremer Affidavit and paragraph 29 of the Second Bremer Affidavit, Bremer discusses the Rolands lunch with no mention of Paul C. Jenkins having been introduced by Mr. Calvo as a potential lender. He also admits that Mr. Calvo was accompanied by Nina Gordon, an attorney employed by Mr. Calvo.

(g) In paragraph 32 of the Second Bremer Affidavit, Bremer claims that he met with Mr. Calvo during the afternoon of April 19, 1985, after lunch, however, at the Final Hearing he admitted that Mr. Calvo had to leave lunch early because of appointments, and that he did not see Mr. Calvo again until running into him at Shooters. No such meeting was reflected in the First Bremer Affidavit.

(h) In paragraph 31 of the Second Bremer Affidavit Bremer admits that Richmond contacted the escrow agent directly on Friday, April 19, 1985, to confirm his receipt of funds from escrow, three days prior to delivery of Mr. Calvo's letter of disbursal instructions.

(i) In paragraph 46 of the First Bremer Affidavit, Bremer discusses the incident with Kolonosky at the closing, which he could not recall at the Final Hearing.[98]

(j) In paragraph 51 of the First Bremer Affidavit, Bremer admits that he and Granai flew to Florida on April 18, 1985, rather than earlier as testified to at the Final

---

97. Excerpts from the testimony of Mr. Granai to the Securities and Exchange Commission read into the record of the Florida Bar Case make it clear that the scenario described by Mr. Granai to Mr. Calvo differed drastically from that described by Bremer, see Mr. Calvo's brief to the Florida Supreme Court filed in support of this Motion.

98. That incident's sole purpose was to make Mr. Calvo believe that the Warehouse offering was oversubscribed, and thus not to question the Bremer stock purchase. Had the Kolonosky stock purchase been accepted, then, as far as Mr. Calvo knew, the minimum offering would have been exceeded excluding Bremer's stock purchase.

Hearing. In that paragraph he also admited that there was a discussion of meeting use of proceeds requirements (although he, unlike Mr. Calvo, Granai and Gallagher, claimed such discussion was for deception purposes)[99] at an April 19, 1985 meeting in Mr. Calvo's offices, a discussion he flatly denied at the Final Hearing.

(k) In both the First Bremer Affidavit and the Second Bremer Affidavit, Bremer on several occasions reflects meetings with Beer,[100] who he claimed acted as "blue sky counsel" in the Warehouse offering. The Bremer tapes disclose that Beers' partner Wilkes was informed by Granai in early May of 1985 that the offering closed short, however, in paragraphs 75 and 76 of the First Bremer Affidavit, Bremer claims that Beer was shocked to discover such fact during a June 13, 1985 meeting, immediately after which he retained attorney Kaplan and, together with Beer, contacted the Justice Department and Securities and Exchange Commission.

(l) In paragraph 79 of the First Bremer Affidavit Bremer claims that Mr. Calvo was told about his indictment but was unconcerned (he also testified to that effect at the Final Hearing);[101] *however, in paragraph 47 of the Second Bremer Affidavit, Bremer swore that Mr. Calvo "had expressed the opinion that a post effective amendment should be filed disclosing my [Bremer's] indictment, and that I [Bremer] should resign from Warehouse." Furthermore, in paragraph 48 of the Second Bremer Affidavit, Bremer admits that he agreed to resign.*

---

99. Since the story appears to have been told only to Messrs. Calvo and Gallagher, they had to have been the targets of that deception.

100. The attorney who as of the September 24, 1984 retainer letter with Bremer, replaced Mr. Calvo's firm in the Warehouse offering. An investigation of the Warehouse matter examining correspondence from the Beer firm to the National Association of Securities Dealers, Inc., and Securities and Exchange Commission, on behalf of the underwriter, would make his role obvious.

101. That was clearly the conclusion of the Florida Supreme Court in the Florida Bar Case.

8. Such drastic differences as to material facts make it clear that Bremer lied on numerous occasions, and that when considered with the consistency of Mr. Calvo's testimony and the prior testimony of the Gallaghers and Granai, and, the affidavits of Messrs. Jordan, Burckhardt, Jenkins, Baldrica, Scherer and, on two occasions, Ms. Daniels, Mr. Calvo's version of the events is the most credible.[102] It also makes it clear that Bremer's testimony at the prior Warehouse proceedings was unreliable, casting significant and material doubts on the results thereof and on the conclusions based thereon.

9. *Most important of all in the Florida Bar Case, where the lives of Mr. Calvo and his family hang in the balance, in paragraph 52 of the First Bremer Affidavit, Bremer flatly admits*[103] *that Mr. Calvo believed that the purchase of stock by Bremer (as explained to Mr. Calvo) was unequivocably legal.*

10. Mr. Calvo has a right to due process guaranteed by the Fourteenth, Sixth and Fifth Amendments to the United States Constitution, and by Sections Two, Nine and Sixteen of Article One of the Florida Constitution, which included the right to representation by counsel, in the Florida Bar Case. That right was violated,[104] and consequently such

---

102. If Mr. Calvo had been a participant in the Bremer conspiracy, he certainly would not have objected to the exclusion of the Bremer indictment from Granai's opinion, or, as testified to by the Florida Bar's witness, Caruncho, suggested that Bremer provide a certification that it had been dropped; he would not have differentiated the treatment of Richmond (as opposed to the other lenders) in the disbursal instructions; he would not have suggested the Granai trust arrangement, or thereafter, written to Granai asking that the promised documents be provided to Gallagher so that Granai could disburse the offering proceeds held in trust; or, he would not have advised Gallagher that Gallagher could not sell out the huge Bremer stock position, except in reliance on the dribble out provisions of Securities and Exchange Commission Rule 144.

103. Confirming the assertions in the Granai deposition that Mr. Calvo was certain that the Bremer stock purchase was legal, and, confirming Bremer's testimony at the Final Hearing that, at the closing, Mr. Calvo did not believe that anything improper was being undertaken. Consequently, at most, the Florida Supreme Court should have found that Mr. Calvo misunderstood or misanalyzed the Bremer proposal, as described to him by Granai.

104. Mr. Calvo was also not represented by counsel at the grievance committee hearing because the Florida Bar refused to grant a short continuance permitting

proceedings should either be considered a nullity, or a hearing granted at which Mr. Chamberlin is permitted to participate.[105]

III. Unconstitutionality of DR1-102(A)(6)

1. The disciplinary rule on which the Florida Bar Case was based is unconstitutionally vague in violation of due process guarantees of both the Constitution of the State of Florida and the United States. The due process protections of both the Florida and United States Constitutions require that statutes or rules that govern conduct "be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties, and be couched in such terms that are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application.[106] Such statutes, in a legal setting, lend themselves "to selective enforcement against unpopular causes," see NAACP v Button, 371 U.S. 415 (1963).[107]

2. DR1-102(A)(6)[108] provides as follows: "A lawyer shall not

---

attendance by his attorney. The only continuance in the Florida Bar Case granted to Mr. Calvo was during the pendency of his successful appeal of the referee's decision limiting issues at trial. All of Mr. Calvo's other requests for postponements, even in the interests of clients facing federal criminal proceedings were rejected, while postponements to meet the Florida Bar's vacation schedule were liberally granted.

105. The right under the Florida Constitution to assistance of counsel cannot be rendered illusory or ineffective by a trial court's rulings, see Myles v State, 602 So.2d 1278 (1992). The case of Traylor v State, 596 So.2d 957 makes it clear that the evidence presented at the Final Hearing in violation of Mr. Calvo's right to representation by counsel is not competent evidence, and cannot be used to justify the Florida Supreme Court's decision in the Florida Bar Case.

106. See Baggett v Bullitt, 377 U.S. 360 (1964); Keyishian v Board of Regents, 385 U.S. 589 (1967); Watkins v United States, 354 U.S. 178 (1957); Lovell v City of Griffin, 303 U.S. 444 (19__); Thornhill V Alabama, 310 U.S. 88 (1940); Talley v California, 362 U.S. 60 (1960); Edwards v South Carolina, 372 U.S. 229 (1963); Cox v Louisiana, 379 U.S. 536 (1965); and, Brown v Louisiana, 383 U.S. 131 (1966).

107. See also Southeast Aluminum Supply Corp. v Metropolitan Dade County, 533 So.2d 777 (3rd DCA 1988).

108. DR1-102(A)(6) was not included in the revised rules governing the

"[e]ngage in any other conduct that adversely reflects on his fitness to practice law." The phrase "any other" makes it clear that the proscribed conduct is something other than that defined in the other five subsections of DR1-102(A), but provides utterly no guidance as to what such conduct might be. Its catch all nature is sufficient to permit the Florida Bar to disbar any attorney it or its cronies find objectionable, on virtually any grounds they can imagine. It is therefore constitutionally deficient and the Florida Bar's prosecution of the Respondent thereunder may not be permitted. See **Webb v Department of Professional Regulation, Board of Professional Engineers**, 595 So.2d 1103 (5th DCA 1992); and, **Delk v Department of Professional Regulation**, 595 So.2d 966 (5th DCA 1992).[109]

IV. Improper Introduction of Decisions Based on Lower Standards of Proof

1. The decision in the Florida Bar Case was based almost entirely on the judgments of the District Court and Securities and Exchange Commission judge in the Prior Warehouse Cases.

2. The judgments were introduced at the hearing as evidence over the Petitioner's objections, despite the fact that the standard of proof in the Prior Warehouses Cases (a preponderance of the evidence) was less than the standard of proof in the Florida Bar Case (clear and convincing evidence).

3. The Florida Supreme Court, contrary to its prior decisions

---

Florida Bar promu'gated in 1987. Ilowever, the Florida Supreme Court refused to follow its prior rulings to the effect that repeal without a savings clause or substantial re-enactment of a rule regulating conduct renders it inapplicable, even in then pending cases. See Fort v Fort, 104 So.2d 69 (DCA 1, 1958); Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964); Pensacola & A.R. Co. v State, 1903, 45 Fla. 86; 33 So. 985, 986; and, State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959). Such refusal deprived Mr. Calvo of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

109. See also D'Alemberte v Anderson, 349 So.2d 164 (1977); and, State v Wershow, 343 So.2d 605 (1977).

on point[110] and decisions throughout the federal court system, held that their admission was appropriate and the different standards of proof affected only the weight of the evidence.

V. Constitutionally Prohibited Ex Post Facto Regulation

1. The Florida Supreme Court's decision amounts to the promulgation of constitutionally impermissible *ex post facto* standards governing professional conduct.

2. The Florida Supreme Court decision was based on an interpretation of securities laws totally contrary to that reflected in the Securities and Exchange Commission's own regulations, as well as in materials promulgated by the Florida Bar. The Florida Supreme Court determined that the expert witness' testimony introduced by the Florida Bar was proper and accurate concerning the Respondent's status as legal counsel to the "parties"[111] and as to the role of legal counsel as an "expert" in conjunction with liabilities and responsibilities for preparation and amendment of registration statements filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended.

3. In this regard, the Florida Supreme Court must have rejected the materials from other jurisdictions introduced by the Respondent to prove the contrary point, as well as Securities and Exchange Commission Rules 436(e)[112] and

---

110. See Lawton v State, 13 So.2d 211 (1943), The Florida Bar v Price, 478 So.2d 812 (Fla. 1985).

111. Despite the fact that Bremer has consistently admitted that the Respondent did not represent Warehouse, and that no testimony was introduced by either the underwriter or the Respondent admitting that at the times in question, the Respondent represented the underwriter. Indeed, that factual conclusion flies in the face of the retainer letter entered into by the Beer firm replacing Mr. Calvo's firm, on September 24, 1984, which was introduced at the Final Hearing. See excerpts from Bremer affidavits discussed in the Pending Motion for Rehearing, and discussions of the replacement as counsel in Mr. Calvo's brief and reply brief, all filed in support of this Motion.

112. Specifying that counsel to the underwriter was not included in the class of experts, and therefore not required to file a consent to the use of its name in a registration.

478.[113]

4. While Florida is free to create its own standards for the conduct of its attorneys, whether or not in agreement with the standards of the Securities and Exchange Commission, the federal courts or other states, the Florida Bar had itself indicated to the legal community in the State of Florida[114] that in the preparation of registration statements, attorneys were not to be deemed experts,[115] thus the Florida Supreme Court's change of interpretation involves the promulgation of constitutionally prohibited *ex post facto* regulation of professional conduct.

VI. Violation of Right to Equal Protection

The decision in the Florida Bar Case violates the Petitioner's right to equal protection guaranteed by the constitutions of the United States and Florida in a number of ways, including assessment of costs,[116] failure to abide by decisions of

---

113. Specifying who could amend a registration statement, *i.e.*, only those who had signed it or filed consents to the use of their names therein.

114. In light of the mandatory education requirements imposed by the Florida Supreme Court and the fact that such information was provided by the Florida Bar at one of the seminars presented in conjunction therewith, it is manifestly unfair and a violation of due process to disbar an attorney for relying on the information so provided.

115. See the lecture outline for the Florida Bar's 1987 continuing legal education program entitled *Responsibilities and Liabilities of Corporate Directors, Officers and Attorneys*, at pages 5.9, 5.10, 7.18, 7.19, 7.20, 7.21, 7.24, 7.25, 7.35, 7.36, 7.37, 7.38, 7.39., 7.42, 7.44, 7.55 and 7.46. This Court is asked to note that there is a very large difference in responsibility reflected, based on whether or not the lawyer was issuing written opinions to be shown to third parties, but that even in such cases, the attorneys' liability was not deemed to be as described by the Florida Bar's expert, whose testimony was totally at odds with that presented by the Florida Bar in this seminar and publication! It is further asked to remember that, in the Gallagher Case before this very Court, legal counsel to the Securities and Exchange Commission unequivocably stated that Mr. Calvo had provided neither oral nor written opinions in conjunction with the Warehouse closing.

116. The Florida Supreme Court assessed all of the Florida Bar's costs against the Respondent, despite the fact that: (i) The Florida Bar's initial strategy of limiting issues at trial had been reversed by the Florida Supreme Court the previous year; (ii) The Florida Bar had been forced to drop a majority of the counts in its complaint against the Respondent when it found that they had not, in fact, ever been authorized, and would have violated the Respondent's constitutional rights to due process; (iii) The testimony of Bremer at the Final Hearing was neither credible nor supportive of essential aspects of the Florida

the Florida Supreme Court setting the standards for Florida Bar disciplinary proceedings and imposition of disproportionate discipline on minority attorneys. The violation of equal protection involves, among other aspects, the fact that the Petitioner's Colombian ancestry was made a finding of fact by the referee and was followed by prejudicial citation to irrelevant decisions by Florida Bar counsel, involving attorneys engaged in the narcotics trade.

VII. Due Process Violations Involving Discovery, Mandatory Judicial Notice, Exclusion of Improper Evidence and Introduction of Relevant Evidence

1. The Florida Bar and the Florida Supreme Court are bound by the guarantees of due process and equal protection imposed by the Florida and United States Constitutions.[117] In that regard, Mr. Calvo was entitled, during the conduct of the Florida Bar proceeding, to a meaningful ability to defend himself.[118]

2. Notwithstanding such rights, Mr. Calvo was deprived of his rights:

Bar's allegations, and, as in the case of Richmond, could have been presented without a personal appearance; and (iv) The Florida Supreme Court's decisions on factual issues appear to be based almost exclusively on the final decisions in the prior injunctive action and 2(e) proceeding. The Florida Supreme Court established the factors for assessment of costs in a case cited by the Florida Bar itself, The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978). Such factors should have led to a determination that, even if the Florida Bar was successful in its case, each party should have borne its own costs. To decide otherwise violates the guarantees of equal protection contained in the Florida and United States Constitutions.

117. Licenses essential in the pursuit of a livelihood may not be revoked or suspended without procedural due process, see Robinson v Florida Board of Dentistry, Department of Professional Regulation, Division of Professions, 447 So.2d 930 (3rd DCA 1984).

118. See the following cases where the Florida Supreme Court found guarantees that should be applied to the Florida Bar Case: The Florida Bar v McCain, 361 So.2d 700, 705 (Fla. 1978); Florida Bar v Randolph, 238 So.2d 635 (1970); Lawton v State, 13 So.2d 211 (1943); The Florida Bar v Price, 478 So.2d 812 (Fla. 1985); Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Simmons, 391 So.2d 684 (1980); The Florida Bar v Borja, 609 So.2d 21 (Fla. 1992); and, The Florida Bar v Agar, 394 So.2d 405 (1981).

A. To conduct meaningful discovery;[119]

B. To have matters judicially noted under mandatory judicial notice provisions of Florida law, and to introduce relevant, competent evidence (as a result of the refusal of the referee to take such notice or admit such evidence);[120]

C. To have inappropriate and prejudicial evidence excluded;[121]

3. The case of **Banks v Vickery**, 521 F.2d 814, 815 (1975), deals with constitutional challenges to the Georgia Bar exam by a class comprised of black applicants. While the plaintiff's did not succeed in their case, the court specifically found that states may not conserve or allocate a right to practice law;[122] and, that states cannot restrict practice of law in violation of rights to due process under federal and state constitutions.[123]

4. In **Davis v United States**, 415 F.Supp 1086 (1976), the court held that constitutional deficiencies in the administrative fact finding process "fatally infected" the integrity of the administrative findings.[124]

---

119. As a result of protective orders granted in favor of the Florida Bar, as a result of the refusal of the Securities and Exchange Commission to provide copies of required materials, and, as a result of the alleged loss by the Florida Bar of years worth of its files, including the materials provided by Mr. Calvo to the Florida Bar in conjunction with its investigation.

120. Among the excluded materials were the proceedings in the Gallagher Case decided by this Court and the report of the American Bar Association and the Association of the Bar of the City of New York dealing with the ethical obligations of attorneys in matters involving securities laws.

121. *E.g.*, the Bremer hearsay testimony, the erroneous testimony of the expert witness and the final judgments in the Prior Warehouse Actions which involved lower standards of proof.

122. By analogy, it may not deprive minorities of the right to practice law by prejudicial enforcement of ethical rules.

123. At 1103.

124. The case specifically deals with attorneys, at pages 1091, 1092!

5. In Holman v Washington, 364 F.2d 618 (1967), the court dealt with the use of prior evidence without a proper foundation. The court held that such use was a deprivation of due process under the 5th and 14th amendments to the federal constitution, as well as under the applicable state constitution. It indicated that a predicate to use of such indirect evidence was that the prosecution have used diligent efforts to obtain the direct testimony of witnesses. *As applied in the Florida Bar Case, such holding would prohibit the consideration of Bremer's testimony as to the statements made by Granai concerning Mr. Calvo's statements as to Messrs. Jenkins, Baldrica and Scherer, and Bremer's statements concerning the calculations made in Mr. Calvo's presence by Ms. Daniels, all of which have been subsequently denied in sworn affidavits.*[125]

6. In Harrell v Tobriner, 279 F.Supp 22 (USDC D.C., 1967), the court made it clear that the practice of law is a right,[126] rather than a privilege and that states could not restrict constitutionally guaranteed rights for mere administrative convenience. The case of Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935), involved a petition by an incarcerated person challenging the constitutionality of a conviction based on the use of perjured testimony by state officials.[127] The court determined that such conduct, if accurate, deprived the petitioner of his constitutional rights to due process.

7. The Florida Bar has asserted that the practice of law is a privilege and not a right. That attitude is reflected in the manner in which the Florida Bar conducted the Florida Bar proceeding. Clearly, under federal constitutional law, that is not the case and Mr. Calvo was entitled not to a mere hearing, but to all of the rights constitutionally guaranteed in conjunction therewith. Such rights include

---

125. It would also prohibit the testimony of the Florida Bar's purported expert.

126. That is clearly the case under Section One, Article Two of the Florida Constitution, see State ex rel. Sbordy v Rowlett, 190 So.2d 59 (1939).

127. It agrees with the holdings in Dodd v The Florida Bar, 118 So.2d 17 (Fla. 1960); The Florida Bar v Agar, 394 So.2d 405 (1981), cited by the Florida Bar for other reasons!

the right to appropriate enforcement of discovery rights,[128] to timely notice of accusations against him, to a timely hearing of charges against him, to access to mandatory judicial notice as provided by statute, to introduction of relevant evidence on his behalf, and to exclusion of non-competent evidence (especially where competent evidence was readily available). Just as clearly, Mr. Calvo was not provided a hearing that met such requirements.

8. The ability of a person to obtain a fair hearing is more difficult in an administrative setting, where the agency acts as prosecutor, judge and appellate body. In such cases, the agency must carefully monitor its agents to assure that they fully give due respect to the appropriate constitutional guarantees.[129] The Supreme Court failed to do that in the Florida Bar Case and such failure deprived Mr. Calvo of his rights to due process guaranteed by the constitutions of the United States and the State of Florida.

---

128. The referee refused to grant Mr. Calvo the right to propound more that 30 interrogatories to the Florida Bar, despite having been informed that because he lacked funds, the only discovery available to Mr. Calvo was through interrogatories, requests for admission and requests for production of documents. Instead, the referee granted protective orders pursuant to which the Florida Bar had to respond to only five of the interrogatories propounded. A review of such responses, as well as to the response to Mr. Calvo's request for admissions makes it clear that the Florida Bar refused to provide meaningful discovery. Instead it ignored large bodies of irrefutable evidence contradicting its position, and successfully objected to its introduction at the hearing (*e.g.*, this Court's Gallagher Case).

In addition to the formal restrictions imposed by the referee on the conduct of discovery by Mr. Calvo, he was deprived of access to most of his own records. He provided most of them to the Florida Bar during 1988 and such records were never returned. During 1990, in response to an inquiry from Mr. Calvo, the Florida Bar notified him that he was in good standing, as a result of which, he resumed his Florida practice in January of 1991, leaving all remaining Warehouse materials in North Carolina, where they were eventually discarded. At the time the Florida Bar proceeding was initiated in August of 1991, he had virtually no Warehouse materials left, and neither the Securities and Exchange Commission, nor the Florida Bar were willing to assist in reconstructing such evidence. Most shockingly, at the final hearing, legal counsel to the Florida Bar admitted that several years worth of its files in the Florida Bar Case had disappeared.

129. A recent newspaper article reported the formation of a rival bar association because of perceived corruption and cronyism in the Florida Bar.

VIII. Unconstitutionally Nature of Discipline Imposed

1. The eighth amendment to the United States Constitution, as applied to the states by the 14th and fifth amendments, and Section Seventeen of Article One of the Florida Constitution, prohibit the imposition of unusual, cruel or inhuman punishment. Under the facts of the Florida Bar Case, when considered with the intervening punishment to which Mr. Calvo and his family have been subjected and the procedural irregularities associated with these proceedings, the disbarrment of Mr. Calvo is an impermissibly cruel and unusual punishment. The proper tests for imposition of discipline were reflected in the case of **The Florida Bar v Neu**, 597 So.2d 266 (Fla. 1992), cited by the Florida Bar.

2. The Neu case involved commingling of funds, and, the Florida Bar's appeal of decisions by the referee to the effect that the Florida Bar failed to prove, by clear and convincing evidence, that the attorney's conduct constituted dishonesty, misrepresentation, deceit or fraud. The case has no support for any of the Florida Bar's contentions; however, as in the case of most, if not all the cases cited by the Florida Bar, it does support the propositions which Mr. Calvo requested the Florida Supreme Court to espouse, namely, that in order to prove a violation of DR 1-102(A)(6), the Florida Bar had to establish the element of intent by clear and convincing evidence and that discipline in the Florida Bar Case would not serve the three purpose test referred to in that case.

3. At the final hearing, no evidence was introduced to indicate that Mr. Calvo intended to deceive anyone; rather, Bremer, the Florida Bar's chief witness, testified that there was no intent by anyone to engage in unlawful activities with reference to the Warehouse closing, thus, the referee's findings of fact concerning issues of Mr. Calvo's purported dishonesty, fraud, deceit or misrepresentation were clearly erroneous and not supported by clear and convincing evidence.[130]

---

130. The fact that Mr. Calvo believed that the Bremer stock purchase, as described to him by Granai, was legal is buttressed by the Bremer affidavits, relevant portions of which are included as exhibits to the Pending Motion for

4. With reference to discipline, the Florida Supreme Court held that it had to meet three tests:

A. First, the discipline had to be fair to society, both in terms of protecting the public from unethical conduct, *and, at the same time, not denying the public services of a qualified lawyer*. In that regard, Mr. Calvo is subject to a standing injunction against violating securities laws and has served a two year suspension from practice before the Securities and Exchange Commission. That two year suspension, was, in fact, due to the nature of Mr. Calvo's practice, served as a two year suspension in the practice of law, with all the financial and emotional hardships to him and his family that it entailed. Furthermore, Mr. Calvo is, to the best of his knowledge, the only hispanic or securities attorney in his geographic location. A great deal of his practice involving his hispanic clientele is either *pro bono*, or at greatly reduced rates, subsidized by his largely out of state corporate clientele. While the Florida Bar has been bemoaning the inadequate representation of minorities in the legal profession, it is difficult to justify its posture in the Florida Bar Case. Indeed, references to Mr. Calvo's Colombian heritage were not placed in the record by the Florida Bar for his benefit, or for the benefit of Florida's large hispanic population.

B. Second, the punishment must be fair to Mr. Calvo, being sufficient to punish a breach of ethics and at the same time encouraging rehabilitation. Fairness is not served by multiple punishment for the same offense, especially in light of the Florida Bar's un-excused delays in bringing the Florida Bar Case and its myriad procedural deficiencies in the conduct of the Florida Bar Case. Obviously, the discipline recommended has no thought for rehabilitation.

C. Third, the judgment should be severe enough to deter

Rehearing, a copy of which has been filed in support of this Motion.

others. In point of fact, when considered with the results of the injunction and 2(e) sanctions, no further discouragement is required.

IX. Defacto Double Jeopardy

1. Article One, Section Nine of the Florida Constitution prohibits double jeopardy, at least as strongly as the United States Constitution, see **Wright v State**, 586 So.2d 1024 (1991).

2. While normally double jeopardy does not apply to actions by different sovereigns, it would apply where the subsequent action was initiated at the instigation of the other jurisdiction. In the instant case, the missing Bar files would clearly establish that the Florida Bar Case was initiated at the request of the Securities and Exchange Commission, and that its goal was to accomplish what the Securities and Exchange Commission's own judge had declined to do, permanently bar Mr. Calvo.

3. Mr. Calvo has been twice tried and punished for the offenses again charged in the Florida Bar Case. The results of the Florida Supreme Court's current decision has put Mr. Calvo thrice in jeopardy. Double jeopardy exists when the event involves a completely new beginning and the second preceding takes place before a new trier of fact, see **R.M. v State**, 603 So.2d 64 (3rd DCA 1992); **Williams v State**, 601 So.2d 1253 (5th DCA 1992); and, **Polakoff v State**, 586 So.2d 385 (5th DCA 1991). Thus renewal of punishment for offenses already served was not appropriate.

C. LACHES, WAIVER & ESTOPPEL

I. Introduction

1. The Florida Supreme Court failed to consider the multi-year lapse by the Florida Bar in filing the complaint in the Florida Bar Case after authorization therefor by the grievance committee, and the intervening notification to Mr. Calvo that he was, in fact, in good standing as a member of the Florida Bar, as a result of which Mr. Calvo and

his family made drastic changes in their lives, at a cost of more than $400,000 in lost investments in out of state businesses.

2. Were it not for such notification and had Mr. Calvo been told that the grievance committee had recommended that he be disbarred,[131] he would not have moved back to Florida and resumed his practice of law in Florida; rather, he would either have assumed an active role in the management of his family investments in North Carolina, or, returned to practice law in the State of New York.

3. The consequences of unjustified delays in Bar proceedings was addressed by the Florida Supreme Court definitively in the cases of **Florida Bar v Randolph**, 238 So.2d 635 (1970); and, **The Florida Bar v McCain**, 361 So.2d 700, 705 (Fla. 1978).[132]

II. The Randolph Case

The Randolph Case involved allegations that an attorney had misappropriated trust assets for his own benefit. The process was initiated in August of 1963, when a complaint was filed with a grievance committee by interested parties. The transgressions were alleged to have been committed during a four year period starting in 1958 and ending during 1961. The Florida Supreme Court agreed with the findings of the referee that the attorney under prosecution's conduct was grossly irresponsible and almost willfully abusive.

1. A chronology of the case is presented at page 637 thereof and demonstrates that a period of approximately three years passed between the time a client complaint was filed with the grievance committee and the time a complaint initiating the action was filed. There is no indication that the complaint filed was, as in the Florida Bar Case, procedurally deficient (*i.e.*, the complaint in the Florida Bar

131. He first learned of that recommendation during the Florida Bar's closing argument at the Final Hearing .

132. The refusal of the Florida Supreme Court to follow the standards it set in such cases in the Florida Bar Case deprived Mr. Calvo of his right to equal protection guaranteed by the Florida and United States Constitutions.

Case was unsigned and contained a number of unauthorized counts which were subsequently voluntarily dismissed). The proceedings then took an initial three years until completion through the action of the Board of Governors. The aggregate period involved was approximately six years.

2. For purposes of comparison:

   A. The Florida Bar Case appears to have been initiated during 1987[133] and resulted in a recommendation for prosecution by the grievance committee in 1989, however, inexplicably, Mr. Calvo was never notified of such determination. Whereas in the Randolph Case a complaint was properly prepared and filed in less than three months, the complaint in the Florida Bar Case was never properly prepared and was filed three years later.

   B. During the interim, Mr. Calvo was suspended from practice before the Securities and Exchange Commission for a period of two years, a suspension which was completed during 1990. During such period Mr. Calvo ceased all legal activities in Florida and resided with his wife in North Carolina. After completion of the Securities and Exchange Commission suspension Mr. Calvo contacted the Florida Bar concerning his status therewith and was provided with a certification of good standing, whereupon, Mr. Calvo and his family moved back to Florida and he restarted his legal practice. The move back to Florida eventually resulted in approximately $400,000 in losses in an investment in a hotel, partially as a result of extremely negative materials provided to a former employee by either the Florida Bar or the Securities and Exchange Commission.

   C. In August of 1991, Mr. Calvo agreed to assist parties to the Warehouse related series of actions in their defense against Securities and Exchange Commission

---

133. Based on actions that took place on April 19, 1985 and April 22, 1985.

proceedings[134] and almost immediately thereafter, the Florida Bar filed its complaint against Mr. Calvo in the Florida Bar Case.[135]

D. As a result of the Florida Bar's pursuit of a legal theory subsequently rejected by the Florida Supreme Court, a final hearing in the Florida Bar Case did not occur until September of 1992, and the referee entered his decision granting all of the disciplinary requests of the Florida Bar in December of 1992.

E. At the final hearing, the Florida Bar's substantive witnesses all indicated difficulty recalling the events in question because of the lapse in time, especially as to questions propounded by the defense.[136] In addition, substantial quantities of documentary evidence could not be provided, despite the Florida Bar's requests to the Securities and Exchange Commission, because the materials were either in storage or had disappeared.[137]

F. In the Randolph Case, bar counsel was an unpaid volunteer, as opposed to the situation in the Florida Bar Case, where the prosecution was conducted by three attorneys employed on a full time basis by the Florida Bar. Thus, the Florida Supreme Court was careful not to be too critical. Furthermore, the Florida Supreme Court specifically found that once the final participants were in place, the matter was handled in a competent and professional manner. That certainly was not the case presented here. Furthermore, unlike the Florida Bar Case, the Florida

---

134. The Gallagher Case decided by this Court in May of 1992.

135. As a result of which Mr. Calvo's meaningful participation in such case was rendered impossible.

136. That was also true concerning the Florida Bar's witness as to authentication of the unsigned complaint.

137. None of the original materials provided by Mr. Calvo to the Florida Bar during 1988 in conjunction with the Florida Bar's investigation were ever returned to him, and, the Florida Bar claims that it has lost all of its Warehouse files for 1987 and 1988.

Bar itself had played no role whatsoever in the underlying matter, whereas, in the Florida Bar Case, the Florida Bar refused to grant a continuance in an unrelated matter, as a result of which Mr. Calvo was prevented from even considering assuming a formal role in the Warehouse closing, or even dedicating more time, on an informal basis, to the Warehouse closing.

G. The Florida Supreme Court in the Randolph Case noted that the respondent and his family had been subjected to six years of agony, embarrassment, the stigma of community suspicion and criticism and the awesome professional embarrassment generated by the charges of serious breaches of ethics. In the Florida Bar Case, not only have Mr. Calvo and his family been subjected to similar agony, but he has during the interim served a two year suspension, and massive financial losses, not only from income that he did not derive, but the loss of his family's lifetime savings, at least in part as a result of improper conduct by personnel employed by the Florida Bar.

H. The Florida Supreme Court further noted that significant revisions to Bar procedures had been implemented by 1970 which would "eliminate many of the 'built in' delays previously existing." Quoting Burton Young, then the Florida Bar president, the Florida Supreme Court noted that, in the future, disciplinary action would be completed within six months. The Florida Bar Case makes it clear that the Florida Supreme Court's observations were, unfortunately, unduly optimistic and gives credence to the current myriad calls for divesting the Florida Bar of authority to regulate the legal profession.

3. At page 639, the Florida Supreme Court, citing The Florida Bar v Wagner, 197 So.2d 823 (Fla. 1967), states as follows: *"We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgment as a form of discipline. That is so*

even though the record shows that the conduct of the lawyer merits discipline."

4. It is submitted that, in the Florida Bar Case, the Florida Bar's conduct was significantly more inappropriate than that reflected in the Randolph Case, that the suffering and defacto and *de jure* penalties which Mr. Calvo and his family have been forced to endure have been significantly greater than those reflected in the Randolph Case, and that the evidence of culpable conduct was significantly less reliable. Especially when considered in light of the fact that Mr. Calvo completed discipline imposed by the Securities and Exchange Commission in conjunction with the facts involved in the Florida Bar Case more than three years ago, and that under applicable law, the incident is no longer even a disclosure item for federal securities law purposes, this Court is asked to to reject the conclusion of the Florida Supreme Court and instead, to determine that no further discipline of any kind is now warranted.

III. The McCain Case

The McCain Case involved the disbarrment of a former justice of the Supreme Court of Florida for improprieties engaged in while on the bench.[138] The action by the Florida Bar was initiated immediately after the judge left the bench, which was three years after the acts which formed the basis for discipline.

1. The case was cited by the Florida Bar to support its contention that its un-excused and unexplained delays in initiating and prosecuting the Florida Bar Case ought to be ignored. The case does not support the Florida Bar's contention; however, its numerous legal conclusions clearly apply to the Florida Bar Case and are completely supportive of numerous elements of Mr. Calvo's petition for review. They involve the circumstances that warrant dis-

138. The fact that the respondent in the McCain Case was a former member of the Florida Supreme Court should not be a factor justifying different analysis of the applicable factors. That the Florida Supreme Court did so violated Mr. Calvo's rights to equal protection and due process as guaranteed by the constitutions of the United States and the State of Florida.

missal of Bar related actions involving unjustified delays, laches and estoppel; the nature of the evidence required to support a referee's findings of fact (*e.g.*, the inadequacy of hearsay evidence, and, the requirement that the referee's findings of fact be supported by clear and convincing evidence); that a referee's findings of fact will be overturned if they are clearly erroneous, or (*disjunctive*) if they are lacking in clear and convincing evidentiary support); the impropriety of willful and intentional tampering by members of the judiciary or its agencies with pending cases; the impropriety of assessing costs against a respondent where the Florida Bar took an overbroad approach in the action which resulted in dismissal, voluntary or otherwise, of numerous counts included in the original complaint; and, the duty of the Supreme Court to impose appropriate sanctions against the Florida Bar and its agents for acting irresponsibly. They also refer inconclusively to the issue of provision of notice that formal charges have been filed.

2. Such conclusions bear detailed discussion:

A. *Unjustified Delays:*

The Florida Supreme Court found that, while no hard and fast statute of limitations applied to Bar disciplinary actions, "*[l]awyers' rights may be protected without a mechanical and automatic rule setting forth limitations for actions involving misconduct.*" The court indicated that it would "*consider any unexplained, unreasonable delay in presenting the charges, and also, whether by reason of such delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation ....*" Further, the Florida Supreme Court indicated that limitations analogous to statutes of limitations would be appropriate if "*the nature of the circumstances of the particular case*" make it "*unjust or unfair to require the attorney to answer for such occurrence.*"

In the Florida Bar Case, the Florida Bar's delays have not been explained or justified and Bar counsel's objections during cross examination of its witnesses as

to the effect of passage of time on their memories and the unavailability of documents from the Securities and Exchange Commission or the Florida Bar (which lost years worth of files), make it abundantly clear that the delay detrimentally affected Mr. Calvo's ability to conduct his defense. In the Florida Bar Case, the Florida Supreme Court should have, based on the criteria it established in the McCain Case, found the Florida Bar's action was barred as a result of its unreasonable delays. Failure to comply with its own criteria deprived Mr. Calvo of his rights to due process and equal protection guaranteed by the constitutions of the United States and the State of Florida.

B. *Latches*:

The Florida Supreme Court found that four conditions had to be met in order for latches to apply to Bar disciplinary proceedings: (1) Conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is raised; (2) delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he based suit; and (4) injury or prejudice to the defendant in the event relief is accorded in the complaint.

All four elements were clearly present in the Florida Bar Case. (1) The subject proceedings were allegedly based on Mr. Calvo's conduct; (2) the Florida Bar, after having been informed of the grievance committee's decision, failed to initiate the action for several years, despite a statutory duty to act promptly, and with full ability to do so; (3) Mr. Calvo was never informed of the grievance committee decision, and, instead, was, prior to return to Florida and resumption of practice, provided with written certification by the Florida Bar that he was in good standing; and, (4) success by the Florida Bar in securing discipline in the Florida Bar Case destroyed Mr.

Calvo's re-commenced practice of law in Florida, Mr. Calvo and his family have been impoverished again, and he has again been subjected to already suffered public humiliation, scorn and ridicule. *Thus, in the Florida Bar Case, the Florida Bar's action should have been barred by the equitable doctrine of laches.* The Florida Supreme Court's failure to abide by its own standards violated Mr. Calvo's rights to due process and equal protection guaranteed by the Constitutions of the United States and the State of Florida.

C. *Estoppel:*

The Florida Supreme Court ruled that in order for the doctrine of estoppel to apply, three essential elements had to be established: (1) Words and admissions, or conduct, acts and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things; (2) in which the person so speaking, admitting, acting or acquiescing did so willfully, culpably or negligently; and (3) by which such other person is or may be induced to act so as to change his own previous position injuriously.

All three elements were clearly established in the Florida Bar Case. (1) the Florida Bar not only failed to notify Mr. Calvo of the grievance committee decision or to promptly file the required complaint, but affirmatively certified that he was in good standing with the Florida Bar; (2) At best, it must be agreed that the Florida Bar's failure to notify Mr. Calvo of the grievance committee decision or to file its complaint, and its written certification to Mr. Calvo that he was in good standing, where wantonly negligent; and, (3) As a result of the Florida Bar's actions and failures to act, Mr. Calvo and his family moved back from North Carolina to Florida, lost a hotel, restaurant and lounge which Mr. Calvo's wife owned, resulting in the loss of approximately $400,000 in cash invested and three years of uncompensated labor. But for the Florida Bar's actions, Mr. Calvo and his family would either have stayed in North Carolina and continued the hotel, restaurant and lounge business there, or Mr.

Calvo would have resumed his practice of law in the State of New York, where he is also admitted. *Thus, in the Florida Bar Case, the Florida Bar's action should have been barred by the equitable doctrine of estoppel.* The Florida Supreme Court's failure to abide by its own standards violated Mr. Calvo's rights to due process and equal protection guaranteed by the Constitutions of the United States and the State of Florida.

D. *The nature of the evidence required to support a referee's findings of fact (e.g., the inadequacy of hearsay evidence, and, the requirement that the referee's findings of fact be supported by clear and convincing evidence); that a referee's findings of fact will be overturned if they are clearly erroneous, or (disjunctive) if they are lacking in clear and convincing evidentiary support).*

This Court is asked to note that in the McCain Case the Florida Supreme Court upheld the referee's finding of fact that the hearsay statements of J. Vernon Wright, concerning a conversation he had with Judge D.C. Smith in which Judge Smith related that the defendant wanted improper action taken, was not clear and convincing evidence. In the McCain case, the integrity of Mr. Vernon, and his credibility were beyond question.

In the Florida Bar Case, the referee accepted the testimony of Edward Bremer, to the effect that Gary Granai had told him that Mr. Calvo had told him that Paul C. Jenkins, Robert Baldrica and James Scherer were heavy hitters whom Mr. Calvo would introduce for purposes of making loans to close the offering, and that Francesca Daniels had calculated the proper escrow period in Mr. Calvo's presence, and based thereon, made his findings of fact.[139] Clearly applying the McCain case standards, such findings of fact were

---

139. Those assertions were contradictory to those previously made by Bremer in affidavits prepared for the Securities and Exchange Commission. See the excerpts therefrom included as exhibits to the Pending Motion for Rehearing filed in support of this Motion.

unsupported by clear and convincing evidence, but rather by un-persuasive hearsay.[140]

Furthermore, Bremer, unlike Mr. Wright, is a convicted felon and, as exposed by comparing the affidavits[141] he provided to the Securities and Exchange Commission and the Bremer tapes, with his testimony, is utterly incredible, as a matter of law.

The referee also accepted the testimony of the Florida Bar's purported expert, who had no personal knowledge of the facts at issue, almost no experience in small public offerings, and a demonstrated erroneous grasp of the applicable law, and based his findings of fact thereon.

3. *Clearly the McCain case should have led the Florida Supreme Court to reject the referee's findings of fact as clearly erroneous and unsupported by clear and convincing evidence.* The Florida Supreme Court's failure to abide by its own standards violated Mr. Calvo's rights to due process and equal protection guaranteed by the Constitutions of the United States and the State of Florida.

4. In Fuentes v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972), the court outlawed the replevin statutes of numerous states, including Florida. Its relevance in the Florida Bar Case is its holding that the constitutional rights to due process require proper notice and a timely hearing. *In the Florida Bar Case, Mr. Calvo was not provided with notice of the filing of a complaint in 1987, the only notice being a 1988 notification that the matter was being referred to a grievance committee; Mr. Calvo was not provided with notice of the decision of the grievance committee during the fall of 1989 until receipt of a complaint in the Florida Bar*

---

140. See Holman v Washington, 364 F.2d 618 (1967), regarding constitutional requirements applicable for introduction of hearsay evidence.

141. Excerpts therefrom are included as exhibits to the Pending Motion for Rehearing, a copy of which has been filed in support of this Motion.

The Pending Motion for Rehearing contains a crucial discussion of the differences, as well as the admissions favorable to Mr. Calvo in such affidavits.

Case during August of 1991. This despite the internal requirement elucidated by the Florida Supreme Court in the Randolph Case, that disciplinary matters be resolved within six months after initiation of an investigation. Mr. Calvo was therefore provided with neither meaningful notice nor a timely hearing.

D. Miscellaneous Matters

I. Attorney Client Privilege

The Florida Supreme Court has based its decision, in part, on a determination that Mr. Calvo's otherwise applicable duty of confidentiality, was superseded because the conduct of the participants in the Warehouse matter was criminal, regardless of whether or not a criminal proceeding was ever initiated. In that regard this Court is respectfully requested to note that Bremer testified that at the closing, there was no intent by anyone to engage in any improper conduct, and that intent is a critical element in the commission of a crime.[142] Thus, not only has a criminal action never been initiated, but the Florida Bar's own witness in chief has testified in a manner making such a determination inappropriate. All other participants in the Warehouse closing who have been subject to Securities and Exchange Commission proceedings have vigorously denied any wrongful intent. There is utterly no evidence indicating that Mr. Calvo was aware that anyone intended to engage in criminal conduct, and therefore, the Florida Supreme Court's decision should not be followed.[143]

II. Vulnerability of Victims

1. The Florida Supreme Court, addressing the issue of ap-

---

142. In essence the Florida Bar Case stands for the proposition that the attorney client privilege can be ignored if the attorney merely should have suspected that a client might not be telling the truth; whether or not the attorney, in fact, had such doubts!

143. The Florida Supreme Court indicated that Mr. Calvo was obligated to notify investors of a number of facts, however, it ignored the fact that Mr. Calvo could not, on his own, modify the Warehouse registration statement and that Mr. Calvo had no way of knowing who the investors were. Furthermore, the timing involved and the overlapping hearing which the Florida Bar refused to reschedule made any such attempt impossible.

propriate punishment, found the victims of the Warehouse closing to be especially vulnerable. The fact is that no evidence was introduced at the hearing by any purported victims. Without minimizing the seriousness of the fraud and misconduct perpetrated by Bremer (the Florida Bar's chief witness), the fact is that there were no widows and orphans involved in the Warehouse matter. Investors in new issues are not vulnerable members of society, rather, securities laws as well as the know your customer rules of the National Association of Securities Dealers, Inc., wisely limit participation in new issues to sophisticated investors with substantial securities experience who, in addition, can afford the loss of their investment, a fact prominently reflected in the risk factor section of the registration statement.

2. In the instant case, a major portion of the non-Bremer investors invested through selected dealers who were licensed securities professionals and who were completely aware that the parties believed April 22, 1985, was the proper closing termination date. The bulk of the subscriptions, in fact, were submitted after April 7, 1985.

3. The Florida Supreme Court concluded that the Warehouse securities were worthless at the time they were issued. There was no support on the record for that conclusion. Rather, the facts demonstrate that from the time of closing until the termination of trading when the Securities and Exchange Commission launched its actions, the Warehouse securities traded at a premium.[144] To this day, Bremer continues to claim that Warehouse was a legitimate company and presented investors with a reasonable investment opportunity.

4. The Florida Bar and its expert have taken the position that in making Warehouse related decisions, the only interest that should have been considered was protection of the new investors. However, Warehouse was an existing public company, with existing employees, and a large number of existing stockholders.[145] It would have been irresponsible

144. A small premium, unlike the wild overcharging that later permeated the penny stock market.

to ignore their rights out of hand, and to have destroyed their company, if, in fact, there was a reasonable possibility that the factual allegations presented by Messrs. Bremer and Granai to Mr. Gallagher were accurate. In fact, if the factual allegations presented by Messrs. Bremer and Granai to Mr. Gallagher were accurate and Mr. Gallagher had refused to close, then both Warehouse and its existing stockholders may well have had a cause of action against the underwriter for failure to use its best efforts to complete the offering.

III. The Florida Bar's Role

1. Perhaps the most incongruous aspect of the Florida Bar Case is the unrefuted fact that the Florida Bar played a direct role in the Warehouse closing fiasco. On April 22, 1985, the day of the Warehouse closing, the very same office of the Florida Bar that prosecuted the Florida Bar Case, had a date with Mr. Calvo which it refused to break.

2. It is unfortunate that bureaucrats in general and the Florida Bar specifically have become so aggressive in their quest for victory that they disdain the courtesies attorneys normally grant each other. Those courtesies have permitted the efficient functioning of a judicial system where scheduling conflicts are the rule, rather than the exception. Such disdain, although technically unassailable, can have devastating consequences, like the Warehouse case.

3. Whether or not Mr. Calvo would have been able to more effectively participate in the Warehouse closing if he had been provided the time is speculative. Whether or not, given the brevity of available time, even if the Florida Bar had agreed to postpone its hearing on April 22, 1985, Mr. Calvo would have elected to assume a role as underwriter's counsel is speculative. That he was not provided such opportunity, or the opportunity to engage in all of the due diligence and factual verification that the Florida Bar now claims was required, is not speculative. That the Florida

---

145. The Warehouse stockholders prior to the offering unaffiliated with Bremer were no more or no less vulnerable than those who invested during the 1984-1985 public offering.

Bar itself was the entity responsible for such failure is also not speculative.

4. While the Florida Bar cannot be blamed for the Warehouse fiasco, it is obvious that of all the agencies that have ever existed, it is most estopped from holding Mr. Calvo responsible for that which it itself prevented him from doing.

IV. Mr. Calvo's Background

1. In reaching a decision in this matter and evaluating the veracity of the parties and witnesses, the Court is requested to note that Mr. Calvo has a history of striving for excellence in the practice of law and in his role in society.

2. His parents were unable to pay for his legal education, and, like many other minority lawyers, he worked his way through law school. Mr. Calvo was a full time teacher, coached an equestrian team and headed two academic departments at the same time that he attended law school. Despite such additional responsibilities, Mr. Calvo graduated in the top ten percent of his law school class with a substantial quantity of additional credit hours in topics he deemed important to his professional development.

3. Wanting to be the best possible lawyer, Mr. Calvo thereafter immediately obtained an LLM degree, where he was again at the top of his class.

4. While, at the time, Florida had no continuing legal educational requirements, Mr. Calvo imposed them on himself and was designated in not one but two areas of the law.

5. Mr. Calvo has always donated his time generously for the benefit of his community and to assist those who cannot afford to pay for legal services. He was one of the featured speakers in the Florida Bar's program on corporate law in 1985, the year of the Warehouse closing, and during the twelve month period following the Warehouse closing, contributed more than $20,000 to help build the Greek Or-

thodox cathedral in Fort Lauderdale. Despite the pendency of the Florida Bar Case and the attendant demands on his time, he was a founding director of his local Kiwanis club, he served as the chairman and president of his county's parents' & schools' council and served on his local elementary school advisory council.[146] None of such activities were undertaken for purposes of generating professional clientele but rather, to comply with Mr. Calvo's perceived professional responsibilities to his community.

6. He also served as an unpaid member of the United States Selective System's local board,[147] without pay, for years, both before and after the Warehouse matter.

7. These factors are not indicative of a person who takes his professional responsibilities lightly, or who meets the unprofessional profile in which the Florida Bar seeks to cast him; rather, they confirm the uncontested testimony of the many persons whose testimony on Mr. Calvo's behalf was presented to the referee in the Florida Bar Case.[148]

V. Improper Emotional Appeal to Ethnic Background

The referee in the Florida Bar Case found it important to make a factual finding that Mr. Calvo is Colombian. He did so because, throughout the Warehouse related proceedings, the Securities and Exchange Commission and the Florida Bar have made an issue of such fact. It is a shame that being Colombian is considered a negative factor in this country. That evaluation ignores the actual nature of the Colombian people. It is intolerable that the Florida Bar used such factor as an element in its case and the Florida Supreme Court should not have aligned itself with such blatant impropriety; especially when the Florida Supreme Court's stated policy is that of encouraging an increase in the quantity, quality and role of minority attor-

---

146. As a result of the decision in the Florida Bar Case, he has resigned from all such positions. However, he continues to make his time available to assist them on an informal basis.

147. An unpopular but critical job.

148. Although such testimony was totally ignored.

neys in our legal system!

VI. Mitigating v Aggravating Circumstances

1. The Florida Bar, for the first time, during closing arguments, raised the issue of supposedly aggravating circumstances that justified the severe penalty of disbarrment. That issue was not only not plead in the Florida Bar Case, but no evidence in support thereof was properly introduced at the hearing. In fact, such allegation and argument was totally refuted by the only testimony on point, that being the testimony of Messrs. Stein, Lipson and Vogel, Father Nicholas Nick and Mrs. Laura Gallagher as to Mr. Calvo's impeccable good character, honesty and integrity; and, the admissions on cross examination by the Florida Bar's witnesses, that Mr. Calvo had always insisted on full disclosure, never counseled improper conduct and that, in Bremer's case, as reflected in his taped, post closing telephone conversations, that Mr. Calvo would never permit anyone to do anything wrong. Indeed, Bremer's taped conversations with his attorney, Granai, after he had gone to the Justice Department, make it clear that, when Mr. Calvo first came to suspect that anything might have been wrong with the Warehouse closing, his advice was that trading in Warehouse stock had to be stopped. Again, there was no support for the Florida Bar's argument in the record, and in fact, the evidence was overwhelmingly to the contrary. In addition, Mr. Calvo (to his detriment in light of the loss of his materials by the Florida Bar), completely and promptly cooperated with the Florida Bar in its investigation of the Florida Bar Case; and, his state of mind was certainly unusually distracted by the pendency of the Florida Bar's hearing on the date of closing.

2. The Florida Supreme Court's conclusion that Warehouse was not an isolated instance is contrary to the evidence, especially in light of the excerpts from Bremer affidavits included as an exhibit to the Pending Motion for Rehearing. All improprieties alleged occurred, if ever, during the period surrounding the weekend of April 19 through 22, 1985. No evidence of other similar acts was introduced.

3. In light of the foregoing, a weighting of mitigating versus

aggravating factors clearly tilts materially in favor of Mr. Calvo.

VII. Reformation

1. Even if this Court were somehow to find that Mr. Calvo was provided all his Constitutionally guaranteed due process rights, that Disciplinary Rule 1-102(A)(6), remained a viable predicate for Bar actions, and, that the evidence at the final hearing supported a conclusion that Mr. Calvo had violated Disciplinary Rule 1-102(A)(6), this Court should reject the Florida Supreme Court's conclusions regarding discipline. It would be unfair to subject Mr. Calvo to discipline in addition to that already imposed by the Securities and Exchange Commission in the 2(e) proceeding, which was completed during July of 1990, more than three years ago. Under applicable Securities and Exchange Commission law, the Warehouse matter is no longer even a ripe disclosure item as a result of the passage of time since the issuance of the Warehouse injunction, more than six years ago.

2. The Florida Bar introduced absolutely no evidence of any wrongdoing of any kind by Mr. Calvo since conclusion of the Securities and Exchange Commission sanction period. On the contrary, all of the evidence affirmatively and forcefully asserted that Mr. Calvo is an honorable and competent attorney and productive member of his community. The Florida Bar's inexcusable delays should not be permitted to again destroy Mr. Calvo's life, reputation and practice. If Bar discipline is imposed for the purpose of protecting of the public or to rehabilitate Mr. Calvo, then none can be said to be called for now.

VIII. Dispositive Factors at Investigation or Hearing

1. An investigation of this matter at which a small number of objectively ascertainable facts could be considered would be dispositive of the facts material to a decision in this case. Such facts would merely involve: (i) An examination of and introduction of third party financial reports on Messrs. Jenkins, Baldrica and Scherer for April, 1985; (ii) An examination of Ms. Francesca Daniels; and (iii) An

examination of the records of the National Association of Securities Dealers, Inc., and the Florida Securities Division as to who filed materials on behalf of underwriter in Warehouse offering.

2. In light of the procedural deficiencies in the Florida Bar Case, especially the exclusion of Mr. Chamberlin, such factors should be definitively considered and established prior to the imposition of the recommended discipline.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court stay its order of disbarrment and refer this matter to either a grievance committee or special master for disposition, unless, in light of its decision in the Gallagher Case, it finds that the Petitioner should not be subjected to any further discipline.

Respectfully submitted, on January 18, 1994.

William A. Calvo, III
Respondent, *Pro Se*

Supplements to Initial Response

June 14, 1994

The Honorable Miguel J. Cortez, *Clerk*
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
65 Forsyth Street, N.W.; Atlanta, Georgia 30303

Re.: *In the Matter of William A. Calvo, III, Misc. No. 94-1001*

Dear Sir:

Enclosed herewith for purposes of updating your file in the above referenced matter is the Respondent's writ of petition for certiorari in the above referenced matter. According to personnel in the Office of the Clerk at the United States Supreme Court, the Florida Bar did not file a responsive petition during the time provided therefor.

In addition to the foregoing, the Respondent requests that the persons responsible for determinations in this matter note that the legal theory underlying the alleged violations which led to discipline of the Respondent in the State of Florida, based on a prior injunction and Securities and Exchange Commission discipline, was recently rejected by the Supreme Court of the United States in the case of Central Bank of Denver, N.A. v First Interstate Bank, No. 92-854 (April 19, 1994), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. ___ (1994). They are also asked to note that, according to Securities and Exchange Commission Commissioner Richard Y. Roberts, in light of the Central Bank of Denver Case, the Securities and Exchange Commission "has already determined that it will refrain from asserting aiding and abetting liabilities except where expressly provided by statute." See CCH F.Sec.L.R., Update Pamphlet Number 1611, June 1, 1994, at pages 7 and 8.

Based on the foregoing, not only should discipline not be imposed by this Court, but the Court should note that Respondent has for almost a decade, been subjected to improper sanctions, discipline and suffering.

As an aside, the Court is asked to note the recent decision of the United States District Court for the District of Massachusetts (the Boston Office of the Securities and Exchange Commission prosecuted the injunction action against the Respondent) in the case of Austin v Bradley, Barry & Tarlow, CCH F.Sec.L.R., Paragraph 98,219 (current developments, summary in CCH F.Sec.L.R., Update Pamphlet Number 1611, June 1, 1994, at page 5), where the Court found that a New England law firm's knowing failure to disclose the insolvency of their client in a private placement memorandum (including legal opinions that they prepared) was not a violation of federal securities laws because the firm was required to maintain the confidentiality of such information under bar imposed ethical obligations.[149]

Very truly

William A. Calvo, III

September 16, 1994

The Honorable Miguel J. Cortez, *Clerk*
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
65 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re.: *In the Matter of William A. Calvo, III, Misc. No. 94-1001*

Dear Sir:

Enclosed herewith for purposes of updating your file in the above referenced matter is the Petitioner's reply to the Respondent's brief in opposition to the petition for writ of cer-

149. While the Respondent did not, in fact, know of any improprieties, the Florida Supreme Court's decision rejected the argument that attorney client privilege would have precluded the Respondent from disclosing client confidences, even had he been aware of the true facts in the Warehouse case. But for that position, the Respondent is of the belief that the Florida Supreme Court would have had to determine, as did the United States District Court for the District of Massachusetts, that even if the facts were as the Florida Bar alleged, the Respondent would have been precluded from taking the actions the Florida Bar claimed were required.

tiorari in the above referenced matter, together with a copy of a reply appendix. The Florida Bar was requested by the Supreme Court to file a responsive brief after expiration of the time provided therefor, which it did on or about August 15, 1994. I assume that you were provided with a copy thereof by the Florida Bar.

Very truly

William A. Calvo, III

June __, 1995

The Honorable Miguel J. Cortez, *Clerk*
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
65 Forsyth Street, N.W.; Atlanta, Georgia 30303

Re.: ***In the Matter of William A. Calvo, III, Misc. No. 94-1001***

Dear Sir:

Enclosed herewith for purposes of updating your file in the above referenced matter is the decision of Judge Peter Dorsey granting the motion of the Petitioner vacating the injunction which was the predicate for the action by the Florida Supreme Court, on which this Court's pending proceedings are predicated.

The Petitioner especially calls attention to Judge Dorsey's findings that "the effect of the enjoinder has gone beyond the contemplation under which it entered, which constitutes fundamental unfairness."

Very truly

William A. Calvo, III

Vacater Decision

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE
COMMISSION

-vs- Civil No. H-86-282(PCD)

WILLIAM A. CALVO, III

RULING ON MOTION TO VACATE INJUNCTION

Calvo moves to vacate the injunction that bars him from activities violative of the securities laws, SEC v The Electronics Warehouse, et. al., 698 F,Supp, 54 (D.Conn, 1988), aff'd per curium, 891 F.2d 457 (1989), cert. denied, 496 U.S. 942 (1990). He claims it should be vacated based on the current state of the law because its continuation is unnecessary and that he is suffering irreparable harm as a consequence. He was suspended from practice before the SEC until July, 1990 and was disbarred in Florida. Other cited repercussions are irrelevant here.

DISCUSSION:

The fraudulent conduct found was essentially that of the principals of The Electronics Warehouse. However, Calvo's responsibility was found to be sufficient to warrant the order entered. Decisions by the SEC and the Florida courts will not be reviewed in relation to this court's ruling. Moreover, facts found here will not be reconsidered based on alleged changes in SEC claims. Nor will the order be vacated based on the claim that Calvo performed "traditional lawyer's functions." He performed more than "traditional lawyer's functions."

Calvo's position, particularly the ongoing impact of the injunction is germane. The injunction should not be continued if it is no longer useful and if it is having a detrimental effect on Calvo other than its intended purpose.

Calvo's claim stems largely from reactions to his conduct in the SEC v. The Electronics Warehouse case, which are not relevant here. What is relevant is whether movant should be enjoined from violating security laws because without the injunction he would do so. That aiding and abetting is no longer

a basis for Section 10(b) liability is also pertinent. Central Bank of Denver, N.A. v First Interstate Bank of Denver, N.A., ___ U.S. ___, 114 S.Ct. 1439, 1448 (1994).

The SEC relies on 15 U.S.C. 78(u)(d)(1), which contains no specific language reaching "aiding and abetting" that would remove it from Central Bank. The SEC, in support of its argument to enjoin aiders and abettors, cites authority which preceded Central bank. Whether the SEC had a right to seek an injunction against aider and abettor conduct was not an issue in Central Bank.

Accepting Calvo's representations, it appears that he has not violated the injunction. His SEC practice has resumed with the SEC's consent, reflective of some confidence in his ability to comply with the law. Thus he makes a fair case for the premise that the injunction does not continue to serve a useful purpose. he has shown that the effect of the enjoinder has gone beyond the contemplation under which it entered, which constitutes fundamental unfairness. See United States v. Swift & Co., 286 U.S. 106, 119 (1932); Rufi v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992); Nemaizer v. Baker, 793 F.2d 58, 68 (2d Cir.), cert. denied, ___ U.S. ___, 115 S.Ct. 58 (1994). The SEC has not shown that the injunction is needed for its regulatory function.

The need for finality of a decree must be balanced against an injunction's evolving consequences. An injunction which serves little purpose or which causes consequences substantially disproportionate to its purpose must be revisited. The "obey the law" injunction here serves no such purpose to justify its tangential consequences.

CONCLUSION

For the reasons discussed above the motion (Doc. #339) is granted and the injunction as it applies to Calvo is vacated.

SO ORDERED.

Dated at New Haven, Connecticut, May 31, 1995.

Peter C. Dorsey, Chief United States District Judge

Constitutional, Statutory & Regulatory Provisions Involved

Constitutional Provisions

United States

Article One, Section Nine [3]: "No Bill of Attainder or ex post facto Law shall be passed.

Fifth Amendment to the Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Fourteenth Amendment to the Constitution, Section 1: "All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny

to any person within its jurisdiction the equal protection of the law."

Florida

Article One:

Section Two

Basic Rights.

All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Section Nine

Due process

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Section Sixteen (a)

Rights of accused ....

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the

crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Section Seventeen

Excessive punishments

Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

Rule 46(b) of the Federal Rules of Appellate Procedure

When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarrment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the members response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for response if no response is made, the court shall enter an appropriate order.

Rule 5 of the Rules Governing Attorney Discipline in the U.S. Court of Appeals for the Eleventh Circuit

A. When an attorney admitted to practice before the Court has been suspended or disbarred by another court, the attorney shall file a copy of the judgment or order imposing such discipline with the Clerk. Upon receipt of a copy of such judgment or order, whether from the attorney or another source, the Clerk shall issue and serve on the attorney as provided in Rule 12, infra, an order to show cause why the Court should not discipline the attorney in the same manner. The order shall state that unless the attorney files a response with the Clerk within 14 days after service the attorney shall be disciplined accordingly. The order shall further state that if a response is filed the attor-

ney shall be suspended from the bar of the Court until a panel of the Court convened by the Chief Judge or otherwise orders. The panel, after considering the attorney's response, (1) may rescind the order to show cause and lift the suspension, (2) may suspend or disbar the attorney, (3) may refer the matter to the Committee; provided, however that the panel shall not suspend or disbar the attorney or refer the matter to the Committee until any stay of discipline granted by a court having jurisdiction has been lifted.

B. A determination by another court that an attorney has engaged in misconduct shall establish such conduct conclusively for purpose of a disciplinary proceeding pursuant to these rules, unless the attorney demonstrates and the Court is satisfied that:

1. the procedure used to make such determination was so lacking in notice or opportunity to be heard as to constitute a deprivation of the attorney's due process rights; or

2. the proof was so insufficient that the Court consistent with its duty, could not accept as final the conclusion of the other court that the attorney engaged in misconduct.

C. Discipline imposed by another court, whether suspension or disbarrment, shall likewise be imposed by this Court unless the attorney demonstrates and the Court is satisfied that:

1. the imposition of the same discipline by the Court would result in grave injustice; or

2. the misconduct warrants substantially different discipline by the Court.

D. The Court at any time may direct the Committee to conduct disciplinary proceedings or to make recommendations to the Court for appropriate action in light of the imposition of professional discipline by another court.

Regulatory Provisions

Securities and Exchange Commission Rules

Rule 436 Consents Required in Special Cases.

(a) If any portion of the report or opinion of an expert or counsel is quoted or summarized as such in the registration statement or in a prospectus, the written consent of the expert or counsel shall be filed as an exhibit to the registration statement and shall expressly state that the expert or counsel consents to such quotation or summarization.

(b) If it is stated that any information contained in the registration statement has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts, the written consents of such persons shall be filed as exhibits to the registration statement.

(c) Notwithstanding the provisions of paragraph (b) of this section, a report on unaudited interim financial information (as defined in paragraph (d) of this section) by an independent accountant who has conducted a review of such interim financial information shall not be considered a part of a registration statement prepared or certified by an accountant or a report prepared or certified by an accountant within the meaning of sections 7 and 11 of the Act.

(d) The term "report on unaudited interim financial information" shall mean a report which consists of the following:

(1) A statement that the review of interim financial information was made in accordance with established professional standards for such reviews;

(2) An identification of the interim financial information reviewed;

(3) A description of the procedures for a review of interim financial information;

(4) A statement that a review of interim financial information is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is an expression of opinion regarding the financial statements taken as a whole, and, accordingly, no such opinion is expressed; and

(5) A statement about whether the accountant is aware of any material modifications that should be made to the accompanying financial information so that it conforms with generally accepted accounting principles.

(e) Where a counsel is named as having acted for the underwriters or selling security holders, no consent will be required by reason of his being named as having acted in such capacity.[150]

(f) Where the opinion of one counsel relies upon the opinion of another counsel, the consent of the counsel whose prepared opinion is relied upon need not be furnished.

(g) (1) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by a nationally recognized statistical rating organization shall not be considered a part of a registration statement prepared or certified by a person within the meaning of sections 7 and 11 of the Act.

(2) For the purpose of paragraph (g)(1) of this section, the term "nationally recognized statistical rating organization" shall have the same meaning as used in Rule 15c3-1 (c)(2)(vi)(F) (17 CFR 240.15c3-1 (c)(2)(vi)(F)).

---

150. Emphasis added.

Rules Regulating Florida Bar

Former Disciplinary Rule 1-102. Misconduct:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Current Rule 3-7.4

(k) **Preparation, Forwarding, and Review of Grievance Committee Complaints.**

If a grievance committee finds probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint. The record before the committee shall consist of all reports, correspondence, papers, and/or recordings furnished to or received from the respondent and the transcript of grievance committee meetings or hearings, if the proceedings were attended by a court reporter; provided, however, that the committee may retire into private session to debate the issues involved and to reach a decision as to the action to be taken. The formal complaint shall be signed by the member of the committee who presided in the proceeding. The formal complaint shall be in such form as shall be prescribed by the board. If the presiding member of the grievance committee disagrees with the form of the complaint, the presiding member may direct bar counsel to make changes accordingly. If bar counsel does not agree with the

Supreme Court, U.S.
FILED
JAN 12 1996

No. 95 11 22

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MICHAEL SCOTT THOMAS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of Texas

---

PETITION FOR WRIT OF CERTIORARI

THOMAS S. MORGAN *
Attorney at Law
415 West Wall, Suite 209
Midland, Texas 79701
(915) 683-2703
Attorney for Petitioner
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

26 pp

QUESTION PRESENTED

1. Whether the Petitioner was deprived of a meaningful opportunity to present a complete defense in that the Petitioner was deprived of presenting evidence from a co-defendant that such co-defendant was solely criminally responsible.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner and defendant below, Michael Scott Thomas, and the respondent to the Petition, the State of Texas. In addition, Ramsey Harrell was charged in a separate indictment with the same offenses as petitioner.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	5
CONCLUSION	10
APPENDIX:	
Opinion, *Michael Scott Thomas v. State of Texas*, No. 08-94-00297-CR (Court of Appeals for the Eighth District of Texas, July 20, 1995), not reported	1a
ORDER, *Michael Scott Thomas v. State of Texas*, No. 1063-5 (Texas Court of Criminal Appeals, November 15, 1995) (not reported)	10a

TABLE OF AUTHORITIES

CASES	Page
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	6, 9
Crane v. Kentucky, 376 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)	6, 9
Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)	6
Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed.2d 1363 (1914)	9
In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948)	9
United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)	9
Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	6, 10

CONSTITUTIONAL PROVISIONS

United States Constitution

Sixth Amendment 2, 5, 6, 10

Fourteenth Amendment 2, 5, 6, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ———

MICHAEL SCOTT THOMAS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of Texas

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, MICHAEL SCOTT THOMAS, requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth District of Texas entered in this proceeding on July 20, 1995. The Court of Criminal Appeals of Texas refused discretionary review on November 15, 1995. Such refusal of discretionary review became final on November 15, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth District of Texas is not reported, and set out in pages

1a-9a of the appendix. The order of the Texas Court of Criminal Appeals is not reported, but is set out on page 10a of the appendix.

JURISDICTION

The opinion of the Court of Appeals for the Eighth District of Texas was entered on July 20, 1995. The Texas Court of Criminal Appeals, the state court of last resort, refused discretionary review on November 15, 1995. The refusal of discretionary review became final on November 15, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution, which are provided in relevant part.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Appellant was charged by indictment with three counts, namely, Capital Murder, Aggravated Robbery, and Unauthorized Use of A Motor Vehicle. Trial was to a jury, with the jury finding Appellant not guilty of Capital Murder, but guilty of Aggravated Robbery. Punishment was assessed by the jury at nine (9) years imprisonment. Timely appeal was perfected to the El Paso Court of Appeals.

The Court of Appeals for the Eighth Supreme District in El Paso, Texas rendered its decision and delivered its opinion in this case on July 20, 1995, affirming the conviction. No Motion for Rehearing was filed pursuant to Rule 100, Texas Rules of Appellate Procedure, nor did the Court of Appeals order an *en banc* reconsideration of the decision on its own motion, pursuant to Rule 100 (f), Texas Rules of Appellate Procedure.

A Petition for Discretionary Review was timely filed with the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals refused to grant Petitioner's Petition for Discretionary Review on November 15, 1995.

Statement of Facts. The basic scenario of the facts adduced during the trial of the case at bar can be summarized as follows: (1) the co-defendant, Ramsey Harrell, had a falling out with his mother, and was packing his things to move to a friend's house in Amarillo, Texas; (2) the co-defendant was upset and frustrated; (3) Petitioner knew his co-defendant, Ramsey Harrell, from school in Midland; (4) Petitioner and the co-defendant lived about one mile apart; (5) Petitioner lived with his father in a mobile home in the KOA campground; (6) on the date in question Petitioner's father, who went to work as a truck driver and would not be back for a day or two, had given Petitioner $50.00 to spend; (7) Petitioner and his father knew Jerry Hon and Tommy Musick, who lived together and were neighbors, and they were all friends, and often played cards together; (8) neither Pe-

titioner nor the co-defendant had a car, but had to depend on friends to get around or walk or ride a bicycle; (9) the co-defendant told Petitioner of the co-defendant's desire to move to Amarallo; (10) co-defendant and Petitioner agreed to let co-defendant spend that night at Petitioner's house rather than going alone to Amarillo; (11) Petitioner went to the home of the co-defendant and, rather than carry co-defendant's belongings all the way to Petitioner's home, Petitioner telephoned Jerry Hon for a ride to Petitioner's home, and when Hon declined, Petitioner asked Tommy Musick for a ride, to which Musick replied he would; (12) as he always did, Musick carried with him outside the home a black bag, similar to what most men would carry in their wallet, and did have some money inside the black bag; (13) upon picking up Petitioner and co-defendant, the co-defendant, Ramsey Harrell, got into the back seat of the car and the Petitioner sat in the right front passenger seat; (14) from the back seat, the co-defendant pulled out a firearm and shot Tommy Musick in the head four times and took his black bag, with no testimony that Petitioner had any knowledge that the co-defendant possessed any firearm nor any testimony of any knowledge that the co-defendant had the intention of robbing Tommy Musick; (15) the co-defendant then ordered Petitioner to put Musick's body into the back seat, and then the co-defendant drove the car to a remote area in western Midland County, Texas where the co-defendant, including ordering Petitioner around, caused Musick's body to be in a field; (16) the co-defendant drove Musick's vehicle again and, upon stopping, ordered Petitioner to assist in wiping blood stains from Musick's vehicle; (17) the co-defendant then did not want Petitioner out of his sight and forced Petitioner to travel with him to the co-defendant's home; (18) the co-defendant's mother was home at that time, and the three of them went to Whataburger around midnight. At the Whataburger, Petitioner was not hungry and threw up more than once in the men's restroom; (19) the three of them then returned to the co-defendant's home, as the

co-defendant would not allow Petitioner out of his sight; (20) Jerry Hon subsequently talked to the police since Tommy Musick had been missing, and told the police that Musick had left the home to give the Petitioner and the co-defendant a ride; (21) a deputy sheriff with the Midland County Sheriff's Department shortly thereafter went to the home of the co-defendant, and the co-defendant's mother indicated that her son and the Petitioner were in the residence in the co-defendant's bedroom; (22) Petitioner and the co-defendant were split up and taken separately to the Midland County Sheriff's Department, where they each gave statements; (23) the co-defendant, Ramsey Harrell, had his jury trial first, and was found guilty of murder and assessed a 12 year sentence; (24) it is very obvious that the co-defendant, Ramsey Harrell, testified in his own defense at his jury trial, and obviously indicated that Petitioner did not encourage the co-defendant to shoot and rob Musick, and Petitioner was not criminally responsible at all for the shooting and robbing of Tommy Musick under the law of parties, but that the co-defendant was solely responsible, including the fact that the Petitioner had no knowledge that the co-defendant had a firearm, and did not assist or aid the co-defendant in any way; and, (25) the co-defendant, Ramsey Harrell, was called as a witness at trial, but refused to answer any questions, and was held in contempt of court twenty-six (26) times.

REASON FOR GRANTING THE WRIT

This case presents an important question concerning whether the Petitioner was deprived of a meaningful opportunity to present a complete defense because he was deprived of presenting evidence from the co-defendant. That such co-defendant was solely criminally responsible, in violation of his rights under the due process clause of the Fourteenth Amendment, as well as his right of confrontation under the Sixth Amendment.

As to the Question Presented, with regard to the rights of an accused to set forth a defense to the criminal accusation, this Court has stated the following:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a *complete* defense." (emphasis supplied)

Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986).

Very importantly, as the United States Supreme Court established in *Chambers v. Mississippi, supra,* the due process rights of an accused are clearly violated when the defendant is not given the opportunity to present evidence that a third person was solely responsible for commission of the offense for which the accused is standing trial, regardless of the rules of evidence of the state wherein the prosecution occurs.

Bearing in mind the holdings of *Crane v. Kentucky* and *Chambers v. Mississippi,* the basic scenario of the facts adduced during the trial of the case at bar can be summarized as follows: (1) the co-defendant, Ramsey Harrell, had a falling out with his mother, and was packing his things to move to a friend's house in Amarillo, Texas; (2) the co-defendant was upset and frustrated; (3) Petitioner knew his co-defendant, Ramsey Harrell, from school in Midland; (4) Petitioner and the co-defendant lived about one mile apart; (5) Petitioner lived wih his father in a mobile home in the KOA campground; (6) on the date in question Petitioner's father, who went to work as a truck driver and would not be back for a day or two, had given Petitioner $50.00 to spend; (7)

Petitioner and his father knew Jerry Hon and Tommy Musick, who lived together and were neighbors, and they were all friends, and often played cards together; (8) neither Petitioner nor the co-defendant had a car, but had to depend on friends to get around or walk or ride a bicycle; (9) the co-defendant told Petitioner of the co-defendant's desire to move to Amarillo; (10) co-defendant and Petitioner agreed to let co-defendant spend that night at Petitioner's house rather than going alone to Amarillo; (11) Petitioner went to the home of the co-defendant and, rather than carry co-defendant's belongings all the way to Petitioner's home, Petitioner telephoned Jerry Hon for a ride to Petitioner's home, and when Hon declined, Petitioner asked Tommy Musick for a ride, to which Musick replied he would; (12) as he always did, Musick carried with him outside the home a black bag, similar to what most men would carry in their wallet, and did have some money inside the black bag; (13) upon picking up Petitioner and co-defendant, the co-defendant, Ramsey Harrell, got into the back seat of the car and the Petitioner sat in the right front passenger seat; (14) from the back seat, the co-defendant pulled out a firearm and shot Tommy Musick in the head four times and took his black bag, with no testimony that Petitioner had any knowledge that the co-defendant possessed any firearm nor any testimony of any knowledge that the co-defendant had the intention of robbing Tommy Musick; (15) the co-defendant then ordered Petitioner to put Musick's body into the back seat, and then the co-defendant drove the car to a remote area in western Midland County, Texas where the co-defendant, including ordering Petitioner around, caused Musick's body to be in a field; (16) the co-defendant drove Musick's vehicle again, and upon stopping, ordered Petitioner to assist in wiping blood stains from Musick's vehicle; (17) the co-defendant then did not want Petitioner out of his sight and forced Petitioner to travel with him to the co-defendant's home; (18) the co-defendant's mother was home at that time, and the three of them went to Whataburger around midnight. At

the Whataburger, Petitioner was not hungry and threw up more than once in the men's restroom; (19) the three of them then returned to the co-defendant's home, as the co-defendant would not allow Petitioner out of his sight; (20) Jerry Hon subsequently talked to the police since Tommy Musick had been missing, and told the police that Musick had left the home to give the Petitioner and the co-defendant a ride; (21) a deputy sheriff with the Midland County Sheriff's Department shortly thereafter went to the home of the co-defendant, and the co-defendant's mother indicated that her son and the Petitioner were in the residence in the co-defendant's bedroom; (22) Petitioner and the co-defendant were split up and taken separately to the Midland County Sheriff's Department, where they each gave statements; (23) the co-defendant, Ramsey Harrell, had his jury trial first, and was found guilty of murder and assessed a 12 year sentence; (24) it is very obvious that the co-defendant, Ramsey Harrell, testified in his own defense at his jury trial, and obviously indicated that Petitioner did not encourage the co-defendant to shoot and rob Musick, and Petitioner was not criminally responsible at all for the shooting and robbing of Tommy Musick under the law of parties, but that the co-defendant was solely responsible, including the fact that the Petitioner had no knowledge that the co-defendant had a firearm, and did not assist or aid the co-defendant in any way; and, (25) the co-defendant, Ramsey Harrell, was called as a witness at trial, but refused to answer any questions, and was held in contempt of court twenty-six (26) times.

Although the current counsel for Petitioner was not his trial attorney nor represented Petitioner at the Court of Appeals, it is obvious from reading the entire record that the trial court would only permit the prior testimony of co-defendant, Ramsey Harrell, to be presented to the jury *if* Ramsey Harrell answered questions presented to him and, if he answered questions during the Petitioner's jury trial, which was subsequent to Harrell's jury trial, would the jury be informed of and consider that Ramsey Harrell

had testified at Harrell's own trial, that Harrell was solely responsible for commission of aggravated robbery, as well as the shooting of the victim, Tommy Musick, and that Petitioner was not a participant in the shooting and robbing of Tommy Musick, did not encourage such co-defendant to shoot and rob Tommy Musick, that Harrell and Petitioner did not act together, and that Petitioner did not contribute at all toward execution of the shooting and robbing of Tommy Musick and that there was no common purpose (as Petitioner had neither knowledge that Tommy Musick was going to be robbed and shot nor had Petitioner agreed to participate in any such crime). Thus, and so very importantly, the jury in this case was never allowed to hear testimony of Ramsey Harrell at his own trial, that Petitioner was not a party to the shooting and robbing of Tommy Musick, that Ramsey Harrell acted alone in the shooting and robbing of Tommy Musick, that Petitioner never encouraged Ramsey Harrell to shoot and rob Tommy Musick, and had no knowledge whatsoever that Ramsey Harrell had plans to shoot and rob Tommy Musick. Because the jury was never permitted to hear the prior testimony of Ramsey Harrell, namely, that Petitioner was not guilty as a party to the offense of Aggravated Robbery for which he stood trial in this cause, Petitioner has clearly been deprived of a meaningful opportunity to present a *complete* defense, as *Crane v. Kentucky* and *Chambers v. Mississippi* mandate.

As further stated by the United States Supreme Court in *Crane v. Kentucky*, 106 S.Ct. at 2146-2147:

> "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed.2d 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed.2d 1363 (1914) . . . exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutors case encounter and 'survive' the crucible of meaningful adversarial testing.' *United States v. Cronic*, 466 U.S. 648, 656,

104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also *Washington v. Texas, supra,* 388 U.S., at 22-23, 87 S.Ct. at 1924-1925."

Accordingly, by refusing to permit the jury to hear the prior testimony of Ramsey Harrell, to-wit: that Petitioner had no knowledge, did not agree, and did not participate in the shooting and robbing of Tommy Musick, and that the such co-defendant was solely criminally responsible for the shooting and robbing of Tommy Musick, the following rights of the Petitioner have been clearly violated: (1) the due process rights of the Petitioner under the Fourteenth Amendment, Article 1, Section 19 of the Texas Constitution, and Article 1.04, Texas Code of Criminal Procedure; (2) his rights of confrontation under the Sixth Amendment, Article 1, Section 10 of the Texas Constitution, and Article 1.05, Texas Code of Criminal Procedure; and, (3) his rights to compulsory process under the Sixth Amendment, Article 1, Section 10 of the Texas Constitution, and Article 1.05, Texas Code of Criminal Procedure.

Consequently, this Petition for Writ of Certiorari should be granted, the decision of the Texas Court of Appeals, Eighth District, should be reversed, and a new trial should be ordered.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari to the Court of Appeals for the Eighth District of Texas.

Respectfully submitted,

THOMAS S. MORGAN *
Attorney at Law
415 West Wall, Suite 209
Midland, Texas 79701
(915) 683-2703
Attorney for Petitioner

* Counsel of Record

APPENDIX

APPENDIX

[SEAL]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-94-00297-CR

MICHAEL SCOTT THOMAS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

Appeal from the 238th Judicial District Court
of Midland County, Texas
(TC# CRB-20, 851)

OPINION

This is an appeal from a conviction for the offense of aggravated robbery. Upon a finding of guilty, the jury assessed the punishment at nine years' confinement in the Texas Department of Criminal Justice. In a single point of error, Appellant asserts that the trial court erred by refusing to grant his motion for instructed verdict made after the State's case-in-chief. We affirm the judgment of the trial court.

I. SUMMARY OF THE EVIDENCE

On April 14, 1993 at approximately 7:15 p.m., Appellant helped Ramsey Harrell, his friend and co-defendant, run away from home. On their way to the Appellant's house they decided that the Appellant should call a neighborhood friend, Mr. Jerry Hon, and ask him for a ride

home from a local KOA Kampground (KOA). Hon was feeling sick so Hon's housemate, Mr. Tommy Musick (Musick), offered to pick them up. Musick picked the co-defendants up in his silver and black Chysler LeBaron and took them to Appellant's house. There, while still in the car, Harrell shot Musick four times in the back of the head.

Appellant claims that Harrell then drove to an old deserted road and dumped the body. The co-defendants then left the car near the local airport. Harrell took Musick's money bag and put it down his shirt and the two proceeded to walk to Harrell's house.

At approximately 9:00 p.m., the co-defendants arrived at the Harrell residence. According to Appellant, after Harell showered, he emptied the black bag of its contents, which included a wallet and credit cards. Harrell put Musick's black money bag, the bloody clothes, the gun, and bullets in a grey duffle bag. The co-defendants went on an errand for Harrell's mother and then went to Musick/Hon residence. Appellant told Hon that Musick never picked them up. Harrell then drove to a dirt road behind Water Wonderland and threw the duffle bag into a field.

At approximately 3:00 a.m., the police arrived at the Harrell residence and found a pair of bloody jeans in Harrell's room. Harrell admitted to the police that he was the gunman. Appellant, in a statement given to the police that morning, stated that Musick grabbed Appellant's crotch and Harrell, frightened, shot Musick.

Approximately a week after being arrested, Appellant gave another subsequent statement—what Appellant himself described as being "the truth." Appellant led the police to a point behind a local amusement park. There they found a duffle bag with bloody jeans, Musick's belongings, and the black bag that usually contained Musick's money and credit cards.

Appellant maintains that Harrell told him to tell the police that when Musick tried to make sexual advances toward him, Harrell got scared and shot him. Appellant testified that he made his initial statement because he was afraid of Harrell, he was ashamed that he did not help Musick, and he did not want to go to prison. In contrast to Appellant's testimony, Harrell's testimony at his own trial indicated that Appellant did everything that the Appellant claimed Harrell did after the shooting.[1]

Appellant was charged as a party to the aggrieved robbery of Musick. The application paragraph of the charge to the jury provided in relevant part:

> YOU FURTHER BELIEVE BEYOND A REASONABLE DOUBT that the defendant, MICHAEL SCOTT THOMAS, acting with the intent to promote or assist the commission of the said offense of AGGRAVATED ROBBERY by the said RAMSEY BLAKE HARRELL, did then and there solicit, direct, aid, or attempted to aid the said RAMSEY BLAKE HARRELL to commit the said offense of AGGRAVATED ROBBERY, then you will find the defendant, MICHAEL SCOTT THOMAS, guilty of the offense of AGGRAVATED ROBBERY as alleged in COUNT II of the indictment and so say by your verdict.

Appellant asserts that there was no evidence that Appellant was a party to the offense of aggravated robbery and therefore the trial court erred in refusing to grant a motion for an instructed verdict.

---

[1] Harrell refused to testify and was held in contempt of court. Defense counsel did not object to this evidence. While this may be hearsay, hearsay that is not objected to is not to be denied probative value merely because it is hearsay. TEX.R.CRIM.EVID. 802 (Vernon 1994); *See also Mares v. State*, 758 S.W.2d 932 (Tex.App.—El Paso 1988, pet. ref'd).

II. DISCUSSION

A challenge to the trial court's ruling on a motion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the judgment of conviction. *Nevarez v. State*, 847 S.W.2d 637 (Tex.App.—El Paso 1993, pet. ref'd); *Madden v. State*, 799 S.W.2d 683 (Tex.Crim.App. 1990) (disavowing waiver language found in *Hafdahl v. State*, 805 S.W.2d 396 (Tex.Crim. App. 1990).

In reviewing the sufficiency of the evidence to support a criminal conviction, we are constrained to view all the evidence in a light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime as alleged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Geesa v. State*, 820 S.W.2d 154, 159 (Tex.Crim.App. 1991); *Dwyer v. State*, 836 S.W.2d 700 (Tex.App—El Paso 1992, no pet.); *Enriquez v. State*, 826 S.W.2d 191 (Tex. App.—El Paso 1992, no pet). Our role is not to ascertain whether the evidence establishes guilt beyond a reasonable doubt. *Stoker v. State*, 788 S.W.2d 1, 6 (Tex. Crim.App. 1989), cert. denied, 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed.2d 333 (1990). Nor do we resolve any conflict of fact or assign credibility to the witnesses as it was the function of the trier of fact to accept or reject any, part, or all of any witness's testimony. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex.Crim.App. 1992); *Matson v. State*, S.W.2d 839, 843 (Tex.Crim.App. 1991). Instead, an appellate court's duty is only to determine if both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in a light most favorable to the verdict. *Adelman*, 828 S.W.2d at 421-22. In so doing, any inconsistencies in the evidence are resolved in favor of the verdict. *Matson*, 819 S.W.2d at 843, quoting *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App. 1988). The standard of re-

view is the same for both direct evidence and circumstantial evidence cases. *Geesa*, 820 S.W.2d at 158.

Since there is insufficient evidence to convict Appellant as a primary actor for aggravated robbery, a law of parties theory must be used. A person is criminally responsible for an offense committed by another under a theory of parties if the person acts with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974). Where the evidence shows a defendant was not the primary actor but at most, responsible for the actions of the primary actor, the State must prove or the record must show conduct constituting the offense plus an act or acts by the defendant done with intent to promote or assist such conduct. *Beier v. State*, 687 S.W.2d 2, 3 (Tex.Crim.App. 1985).

As noted above, Appellant was convicted as a party to aggravated robbery. Aggravated robbery is defined as when a person commits robbery and he causes serious bodily injury to another or exhibits a deadly weapon.[2] TEX. PENAL CODE ANN. § 29.03 (Vernon 1994). Viewed in a light most favorable to the verdict, we find sufficient evidence which would implicate Harrell and Appellant on aggravated robbery charges. First, prior to the murder, Harrell had mentioned to the Appellant that he had a gun. Second, Musick always kept money in his black bag. Appellant knew Musick carried money and had seen Musick with what looked like a lot of money on a prior occasion. Police found blood and some change laying outside Musick's car when it was found near the airport after the murder. There was no money inside

---

[2] A person commits robbery if, in the course of committing theft and with intent to maintain control of the property he intentionally, knowingly, or recklessly causes bodily injury to another or places another in fear of such an injury. *See* TEX.PENAL CODE ANN. § 29.02 (Vernon 1994).

Musick's black bag when the Appellant led police to it. Viewed in a light most favorable to the verdict, a rational jury could infer there was money in the bag and that, with Appellant's help, Harrell stole the money in it.

Every fact need not point directly to Appellant's guilt; rather, it is sufficient if the finding of guilt "is warranted by the combined and cumulative force of all the incriminating circumstances." *Gribble v. State,* 808 S.W.2d 65, 74 (Tex.Crim.App. 1990), cert. denied, —— U.S. ——, 111 S.Ct. 2856, 115 L.Ed.2d 1023 (1991). This necessary scheme of facts may be found from events which occurred before, during, or after commission of the offense. *Burdine v. State,* 719 S.W.2d 309, 315 (Tex. Crim.App. 1986). In the instant case, the evidence shows that Appellant made the phone call to Musick to ask him to pick up the co-defendants. Eyewitness testimony on the day of the murder and robbery stated that Appellant and Harrell would go into the Appellant's house, would come back out, and then would "do something" in the back of the car. This could lead to an inference of the Appellant's involvement in the offense. Appellant assisted Harrell in the concealment of the offense by telling Hon that Musick had never picked them up.

Appellant admitted being present at the occurrence of the offense and other testimony corroborates this fact. While the presence of the accused at the scene of an offense is not alone sufficient to support a conviction, it is a circumstance tending to prove guilt, which, combined with other facts, may suffice to show that the accused was a participant. *Beardsley v. State,* 738 S.W.2d at 685.

The Appellant admitted that he fled with Harrell in Musick's car. Flight from the scene is a circumstance that may be considered by the jury as an inference of guilt. *Harris v. State,* 645 S.W.2d 447 (Tex.Crim.App. 1983). According to the Appellant, Harrell would not allow him to leave. Appellant claimed that he was frightened by Harrell, yet declined to go to New Mexico when Harrell

wanted to go there to hide out. Appellant's own testimony indicated that Harrell did not threaten him.

Contradictory or false statements can constitute inculpatory evidence that a person was a party to the offense. *Miranda v. State*, 813 S.W.2d 724, 733 (Tex.App.—El Paso 1991, pet. ref'd). After the offense, Appellant made contradictory or false statements concerning his involvement in the offense. He claimed that Musick grabbed his crotch and then later retracted this statement. With such evidence, a rational jury could infer the Appellant's intent and understanding of the common design to commit the offense.

Jurors are the triers of the facts, the judges of the credibility of the witnesses and the weight to be given to their testimony. TEX.CODECRIM.PROC.ANN. art. 38.04 (Vernon 1979). Reconciliation of evidentiary conflicts is solely a function of the trier of fact. In the instant case, much of the Appellant's testimony conflicts with the testimony of other witnesses or with the Appellant's first statement to the police. Carol Harper, manager of KOA Kampground asked the co-defendant who was coming for them before Musick had picked them up. Appellant told her that he called his dad and that his dad was going to pick them up. However, Appellant's father testified that he was not in town on the evening of April 14 and he did not have a phone. Appellant claims that Carol Harper misunderstood him. The jury is entitled to accept or reject all or any part of the testimony by the witnesses for the State and the accused. See *Beardsley*, 738 S.W.2d at 684. Appellant tried to implicate Harrell by testifying that on the night Appellant introduced Musick to Harrell, Musick and Hon got into an argument in which Musick's black bag was knocked down. According to Appellant, both Harrell and himself saw all the contents—credit cards, money, and "slips of paper"—spill out. However, Hon testified that incident never occurred and claimed that on that day there was never any talk about money or credit

cards. The conflicting testimony presented a fact issue for the jury which it resolved by its verdict.

From the combined and cumulative force of all the incriminating circumstances, we find that the jury was entitled to conclude that Appellant knew that Harrell possessed a gun, assisted him in luring Musick to the scene of the robbery, assisted in taking money from Musick's bag, and then proceeded to help Harrell conceal evidence. *See generally, Gribble*, 808 S.W.2d at 74. Thus, contrary to Appellant's argument that the evidence showed he was merely a bystander lacking any culpability, it was rational for the jury to conclude he was directly involved in the offense. *See Harman v. State*, 788 S.W.2d 193 (Tex.App. —Houston [1st Dist.] 1990, no pet.) (evidence supported conclusion that defendant had participated in aggravated robbery, despite claim that he brought accomplices to scene without advance knowledge of their criminal intent and was forced to remain during robbery by their threats; acomplices could not have concealed weapons prior to incident and victims testified that no threats were made against defendant in their presence). Accordingly, Appellant's sole point of error is overruled.

Having overruled Appellant's sole point of error, judgment of the trial court is affirmed.

July 20, 1995

/s/ Richard Barajas
RICHARD BARAJAS
Chief Justice

Before Panel No. 2
Barajas, C.J., McClure and Chew, JJ.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-94-00297-CR

MICHAEL SCOTT THOMAS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

Appeal from the 238th Judicial District Court
of Midland County, Texas

(TC# CRB-20, 851)

JUDGMENT

The court has considered this cause on the record and concludes there was no error in the judgment. We therefore affirm the judgment of the court below. We further order Appellant to pay all costs of this appeal, in accordance with the opinion of this Court, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 20TH DAY OF JULY, 1995.

/s/ Richard Barajas
RICHARD BARAJAS
Chief Justice

Before Panel No. 2
Barajas, C.J., McClure and Chew, JJ.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 15, 1995
COA # :08-94-00297-CR

Re: Case No. 1063-95

STYLE: THOMAS, MICHAEL SCOTT v. STATE OF TEXAS

ORDER

THE APPELLANT'S PETITION FOR DISCRETIONARY REVIEW IS REFUSED.

(FINAL RULING)

TROY C. BENNETT, JR.
Clerk